91-1456

(1)

Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MAHINDER S. UBEROI,
Petitioner,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO COLORADO COURT OF APPEALS

Mahinder S. Uberoi, *pro se*
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March 2, 1992

QUESTIONS PRESENTED

1. May a state court enjoin petitioner from any further self-representation in the case even in a defensive posture, and require him to hire an attorney to represent him, because a coordinate state court enjoined him from appearing *pro se* in any posture in any court in that judicial district on the grounds that his prior litigation was frivolous or vexatious?

2. May a state court deny petitioner's motion for permission to appear *pro se* at the hearing to assess attorney's fees against him and subsequently hold *ex parte* hearing and award fees to respondents for their defense of claims on which petitioner prevailed?

3. Do allegations of stop of petitioner for violation of a traffic sign which respondent police officer knew did not exist and 20 minutes detention beyond the completion of investigatory stop state frivolous federal civil rights claims and justify penalties of attorney's fees in trial and appellate courts under state statutes?

4. Whether respondents' retaliations against petitioner for his civil rights claims against them state new civil rights claims?

5. May a state trial court require review of its judgment simultaneously by two appellate courts; review of judgment by Colorado Court of Appeals and stay of the Judgment to continue until the parties have sought a writ from Colorado Supreme Court?

6. Is state official's grossly negligent violation of petitioner's rights under Bill of Rights and XIV Amend. actionable?

7. Do due process and equal protection require that records of quasi-judicial body, Privilege and Tenure Committee of University of Colorado be open to public and/or to petitioner, as a faculty member of the University, so that he

may examine the case law to determine his rights and privileges and if equal protection was accorded him in his cases before the Committee?

8. May state require prior notice under Colorado Governmental Immunity Act when petitioner seeks injunctive and declaratory relief but no damages against conspiracy of state officials to violate his state and federal civil rights?

9. Can University of Colorado officials avoid federal and state law by creating "private corporations," which are under their control and perform public functions?

10. May a state court dismiss claims, based on transactions occurring after the date of judgment in another case, because of *res judicata* and collateral *estoppel*?

11. Can *res judicata* or collateral *estoppel* arise from proceedings held elsewhere without due process?

12. Whether Colorado Court of Appeals' policy of never allowing *pro se* litigants oral arguments and its denial of petitioner's motion for assignment of the case by blind draw to a panel and repeatedly funneling petitioner's appeals to the same judge violated due process and equal protection?

13. Whether Court of Appeals' award of attorney's fees to respondents with a conclusory opinion that the appeal is frivolous, violated due process and equal protection?

14. May a state (a) refuse to enforce state open records act for petitioner's benefit because it reeks havoc on respondent University of Colorado and legislature would amend it, (b) require petitioner to file copies of full texts of all non-Colorado citations, (c) seize petitioner's privileged documents and (d) destroy evidence admitted into the record, because of petitioner's *pro se* status and his Asian Indian origin?

15. Are Colo. Rev. Stat. §§13-17-101 *et seq.*, on attorney fees and Colo. R. Civ. P. 11 unconstitutional since they deny due process and equal protection by providing for award of attorney's fees and costs to respondents for their defense of claims on which petitioner prevailed and for filing frivolous pleadings and willful violations of statutes and court orders and do not compensate petitioner *pro se* for responding to such pleadings and conduct?

TABLE OF CONTENTS

TABLE OF AUTHORITIES vii

QUESTIONS PRESENTED viii

PETITION FOR WRIT OF CERTIORARI TO COLORADO COURT OF APPEALS 1

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2
- Parties 2
- Complaint 2
- Trial court ordered that respondents cannot deny petitioner benefits of state statutes because of his federal civil rights litigation against them 4
- Trial court ordered review of its judgment simultaneously by two appellate courts 4
- Respondents continued to violate petitioner's civil rights 6
- Petitioner's Amendment to Complaint 6

Second show cause hearing 8
Respondents beg clemency 8
Summary judgment for all respondents 10
Ex-parte hearing awards of attorney's fees to all respondents for defense of all claims, including claims on which petitioner prevailed 11
Proceedings in Colorado Court of Appeal 12

REASONS FOR GRANTING PETITION 13
Injunction issued by a coordinate trial court prohibiting petitioner from appearing pro se in XX Judicial District of Colorado; even in a defensive posture, is unconstitutionally broad and inapplicable to the ongoing proceedings in trial court 13
State court's order expressly prohibiting Asian Indian plaintiff [petitioner] from appearing pro se at hearing to assess attorney's fees against him, and award of attorney's fees to respondents for their defense of claims on which petitioner prevailed and for their frivolous pleadings, are willful violations of equal protection and prohibition against deprivation of property without due process clauses of XIV Amend. and I Amend. right to petition government, through courts, for redress of grievances 15
Respondents' retaliations against petitioner for his civil rights law suits against them are interferences with petitioner's I Amend.

right to petition government through courts 17
Trial court's requirement of review of its judgment simultaneously by two appellate courts was machination to willfully interfere with petitioner's I Amend. right of access to courts because of his Asian Indian origin 18
Trial court's ruling that petitioner's IV Amend. claim of unlawful seizure based on his 20 minutes detention by respondent police officer of investigatory stop was frivolous and respondent may recover his attorney's fees for his defense and Colorado Court of Appeal's ruling that petitioner's appeal of trial court's dismissal of the claim and award of attorney's fees is also frivolous and respondent shall recover his attorney's fees for defense of the appeal, are indications of the extreme prejudice of the courts 19
Case law of a quasi-judicial body should be open to litigants and prospective litigants who have the right to invoke its jurisdiction 21
The state statute requiring prior notice of complaint seeking prospective injunctive relief serves no purpose other than to hinder citizen's I Amend. right to petition the government for redress of grievance and is inapplicable to federal claims, and in any case petitioner complied with notice requirement 22
Res judicata or collateral estoppel cannot arise from proceedings held

elsewhere without due process nor for claims arising from transactions occurring after the date of judgment in another case 23
Claim under U.S. Const. Art 4, §4, U.S. shall guarantee every state in this Union a republican form of government, are justiciable 24
I Amend. right to petition the government and XIV Amend. rights of due process and equal protection require state to maintain orderly and operational courts 25

TABLE OF AUTHORITIES

Cases

Bd. of County Comm'rs v. Winslow, 706 P.2d 792 (Colo. 1985) cert. denied, 475 U.S. 1018 (1986) 14

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) 14

Chambers v. Baltimore & Ohio RR, 207 U.S. 142, 148 (1907) 13

Florida v. Royer, 460 U.S. 491, 500 (1983) 20

Garland v. Polley, 594 F.2d 1220, 1223 (8th Cir., 1979) .. 17

Green v. Warden, U.S. Penitentiary, 699 F.2d 364 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983) 14

Greenholtz, 436 F. Supp. at 436 17

Griffen v. Griffen, 327 U.S. 220, 232 (1946) 23

Hall v. Sutton, 755 F.2d 786, 787 (11th Cir., 1985) 17

Harrison v Springdale Water & Sewer Com'n, 780 F.2d 1422, 1427-8 (8th Cir. 1986) 17

Hoxie School Dist. No. 46 of Lawrence County, Ark. v. Brewer, D.C. Ark. 1956, 137 F. Supp. 364, affirmed 238 F.2d 91 . . 25

In Re Duncan, 139 U.S. 449, 461 (1891) 25

In re Green, 669 F.2d 779, 787 (D.C. Cir. 1981) 14

In re *Martin-Trigona* 737 F.2d 1252, 1258-59, 1264 (2d Cir 1984) 14

Lamar v. Steele, 693 F.2d 559, 562 (5th Cir., 1982) *cert. denied*, 464 U.S. 821, (1983) 18

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 24

Matzker v. Herr, 748 F.2d 1142, 1150-51 (7th Cir., 1984) . 17

Mayfield v. Collins, 918 F.2d 560, 562 (5th Cir. 1991) . . . 14

McCuin v. Texas Power & Light Co., 714 F.2d 1255,1261 (5th Cir. 1983) 23

Miami Intern. Realty v. Town of Mt. Crested Butte, 1579 F. Supp. 68 (D.Colo. 1984) 22

Milhouse v. Carlson, 652 F.2d 371, 374 (3d Cir. 1981) . . . 18

Morrissey v. Brewer, 408 U.S. 471, 481 (1972) 22

O'Shea v. Littleton, 44 U.S. 488, 503 (1974) 16

People v. Carter, 678 F.Supp. 1484, 1491-92 (D. Colo. 1986)14

Sanders, 724 F.2d at 666 17

Shelley v. Kraemer, 334 U.S. 1 (1948) 16

Silver v. Cormier, 529 F.2d 1261, 163 (10th Cir. 1976) . . . 18

Sisco v. J.S. Albercini Const. Co., 655 F.2d 146 (9th Cir., 1981) 18

Terry v. Ohio, 392 U.D. 1, 20 (1968) 20

Thomas v. Collins, 323 U.S. 516, 530 (1945) 14

Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir. 1986) . . . 14

U.S. v. Sharpe, 470 U.S. 675, 686 (1985) 20

Uberoi v University of Colorado, 686 P.2d 785 (Colo. 1984) 6

Uberoi v. University of Colorado et al., Boulder County District Court Case No. 83 CV 625-5 6

Uberoi v. University of Colorado, et al., No. 82 M/LW 806, D. Colo. 10, 23, 24

United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967) 14

United States ex rel. Cleggett v. Pate, 229 F. Supp. 818, 821-22 (N.D. Ill. 1964) 18

Van Sickle v. Shanahan, 1973, 511 P.2d 223, 212 Kan. 426 25

Statutes

18 U.S.C. §242 16

28 U.S.C. §455(a) 23, 24

28 U.S.C. §1257(a) 2

42 U.S.C. §1981 . . . . . 2, 4, 8, 10, 18

42 U.S.C. §1983 . . . . . 2, 4, 10, 18

42 U.S.C. §1985 . . . . . 2, 4, 10

42 U.S.C. §1986 . . . . . 2, 4, 10

42 U.S.C. §1988 . . . . . 2, 10, 20

C.R.C.P. 54(b) 5, 18, 19

C.R.C.P. 62(d) 5

Colo. R. Civ. 11 20

Colo. Rev. Stat. §24-10-109 . . . . . 11, 22

Colo. Rev. Stat. §24-72-202(1.5) 6

Colo. Rev. Stat. §24-72-301 . . . . . 6, 7

Colo. Rev. Stat. §24-72-305(7) 8

Colo. Rev. Stat. §13-17-101 20

Colo. Rev. Stat. §24-72-204(5) 8

Colo. Rev. Stats. §24-72-201 . . . . . 3, 4, 6, 7, 10

Constitution

Bill of Rights §2 . . . . . 2, 3

Bill of Rights §7 2

Bill of Rights §24 2

Bill of Rights §25 3

Bill of Rights, §1 2

Colo. Const. Art. II 2, 10

Colo. Const. Art. VIII §5(2) 3, 8, 10

Colo. Const. Art. XI §1 3

Colo. Const. Art. XI §2 . . . . . 8, 20

U.S. Const. Amend. I 2, 8, 10, 15, 25

U.S. Const. Amend. IV 2, 4, 10, 11

U.S. Const. Amend. XIV 2, 4, 10-12, 15, 25

Other

Cooley, Constitutional Limitations [7th Ed.], p. 45) 25

Law of Torts, 4th Ed., W.L. Prosser, West Pub. p. 293 . . . 23

IN THE SUPREME COURT OF THE UNITED STATES

October, 1991

MAHINDER S. UBEROI, *petitioner*

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, CHARLES M. ABERNATHY, JR., RICHARD J. BERNICK, PETER C. DIETZE, LYNN J. ELLING, HUGH C. FOWLER, SANDY P. KRAMER, NORWOOD L. ROBB, ALBERT R. SEEBASS, TED D. AYERS, W.A.E. SKURNICK, UNIVERSITY OF COLORADO FOUNDATION, INC., CHARLES G. McCORD, JOHN KISH, LLOYD FOSDICK, JOHN TOWLE, JERRY L. JOHNSON and BEN RICH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO COLORADO COURT OF APPEALS

The petitioner, Mahinder S. Uberoi, respectfully, prays that a writ of certiorari issue to review the judgment and opinion of Colorado Court of Appeals entered on April 25, 1991, modified on rehearing on May 23, 1991. Colorado Supreme Court denied certiorari on October 28, 1991.

OPINIONS BELOW

The opinion of Colorado Court of Appeals and the decisions of District Court of Boulder County, Colorado, have not been reported. They are reprinted in the appendix hereto.

JURISDICTION

On November 19, 1985, invoking general jurisdiction of Boulder County District Court, Colorado, petitioner sued respondents for violation of his common law rights, state statutory and constitutional rights and federal rights under color of law, 42 U.S.C. §1983. He sought damages, punitive damages, declaratory and injunctive relief. The court entered final judgment on May 2, 1989 and awarded attorney's fees and costs to respondents on October 12, 1989. Colorado Court of Appeals entered its judgment on April 25, 1991, modified on rehearing on May 23, 1991. Colorado Supreme Court denied certiorari on October 28, 1991.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Parties

Petitioner is a male of Asian Indian origin, U.S. citizen, distinguished tenured professor and 3-term past chairman of Department of Aerospace Engineering at University of Colorado, see *Who's Who in America* and *Who's Who in the World*, current editions.

Respondent University of Colorado Board of Regents is a local governing body of State of Colorado. Individual respondents are agents, officials and police officers of the University.

Complaint

On November 19, 1985, in Boulder County District Court, petitioner sued respondents for damages, punitive damages, penalties, declaratory and injunctive relief under U.S. Const. Amend. I, IV, XIV; 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, Colo. Const. Art. II, Bill of Rights, §§1, 2, 7, 24, and

25; Art. VIII §5(2), provisions governing University of Colorado, Art. XI §§1 and 2, prohibition against mingling of public funds and common law.

Petitioner alleged that on June 18, 1985, he drove his car from University of Colorado parking lot onto a public street. A university police car followed him and stopped him for alleged violation of a traffic sign directing that traffic in the right hand lane should turn right. Petitioner protested that no such sign existed, but the police officer inspected his driving license and car registration and issued a warning. he was then detained for additional 20 minutes for enquiries about his ethnic background. Later, university police department identified the officer as respondent Kish and claimed that incident occurred on June 14, 1985.

That respondent regents have created a "private corporation," the University of Colorado Foundation, Inc., which uses the university's resources to generate funds which are used to pay salaries of select professors and support other work at the University. Petitioner paid $1,000.00 to become charter member of Engineering Dean's Club of University of Colorado Foundation, Inc. The Dean stated that significant parts of funds and resources of the Club and the Foundation will be used to support the work of minority faculty and students. Petitioner and his students who are also racial or ethnic minorities were denied any support and the resources of the Club and Foundation were used directly or indirectly to destroy their research experiments. Racial and ethnic minorities are excluded from the staff and board of directors of the Foundation.

That respondents denied petitioner's requests for inspection of records under Colo. Rev. Stats. §§24-72-201 *et seq.*, as retaliations for his suit in federal court to vindicate his civil rights. Retaliations stated new civil rights claims, in addition to willful violation of state statute.

That respondents maliciously and without any probable cause and on racially discriminatory basis conspired to seize

and harass petitioner, deny him and students direct and indirect support from the Foundation, deny inspection of his own personnel file and records of the quasi-judicial body Privilege and Tenure Committee, intercept and alter students' evaluations of petitioner's teaching. And respondents' conduct was racially motivated interference with his contract of tenured professorship at the University.

That respondents conspired under color of statutes, customs and regulations of State of Colorado and Regents of the University of Colorado and they are liable under IV and XIV Amends., 42 U.S.C. §§1981, 1983, 1985 and 1986. Their conducts were retaliations for petitioner's civil rights suits against some of them and were malicious interferences with his I Amend. right to petition the government in courts to redress his grievances.

Trial court ordered that respondents cannot deny petitioner benefits of state statutes because of his federal civil rights litigation against them

After a show cause hearing, Judge Richtel ruled:

> As relates to the Federal litigation there is nothing in the Statute to suggest that by engaging in litigation with a public entity covered by the statute a person forfeits rights otherwise available under the statute. [Colo. Rev. Stat. §§24-72-201 *et seq.*]. *See* p. a3.

Judge Richtel repeatedly ruled that respondents' defenses were "without merit" and ordered them to produce most of the records in question in 10 days. *See* pp. a1 - a8.

Trial court ordered review of its judgment simultaneously by two appellate courts.

Petitioner moved for disclosure of *all* of the records in question. Respondents moved to reconsider order for

disclosure. On June 13, 1986, Judge Richtel ruled from the bench:

> [M]y sense is that this statue reeks real havoc in the academic context of the University of Colorado... I believe that statute...causes real problems for the University. And I believe that if the legislature were aware of the real problems this statute causes for the University it would probably change the statute... I just don't think the legislature would have passed it had it thought about it as far as impact on the University. Pp. a10 - a11.

Judge Richtel refused to enforce the statute until parties have sought a writ from Colorado Supreme Court. On June 16, 1986 he memorialized his ruling:

> The Court expressly determines pursuant to C.R.C.P. 54(b) that there is no just reason for delay of entry of judgment on that order [for disclosure] and judgment should enter forthwith [so that it is appealable to Colorado Court of Appeals]. However, pursuant to C.R.C.P. 62(d), the Court's order is stayed until further order of the Court *and* at least until the Supreme Court declines to act on the request of either party for relief from the order. [Emphasis added. P. a10.]

As expected, Colorado Supreme Court denied petitioner's petition for a writ since it has no authority to suspend a constitutionally firm statute because it displeases a trial judge.

Respondents continually act in bad faith when dealing with legislature and the courts. Colorado Open Records Law was enacted after a year long legislative study in which the University was consulted. *Open Records for Colorado*, Colorado Legislative Council, Research Publication No. 126, p. 56, (1967). In 1970, President of University wrote to petitioner, as Chairman of Department of Aerospace Engineering, that Open Records Law applies to the University. After petitioner

discovered illegal activities at the University, it prevailed that legislature did not intend to subject it to the law. *Uberoi v. University of Colorado*, 686 P.2d 785 (Colo. 1984). Within weeks, legislature amended the law to state that it always intended to encompass the University within the law. Colo. Rev. Stat. §24-72-202(1.5).

Respondents continued to violate petitioner's civil rights

Petitioner's Amendment to Complaint

On July 28, 1987, petitioner filed motion to amend the complaint by interlineation to which respondents confessed. The amendment *inter alia*, alleged:

That on February 27, 1987, under Colorado Open Records Law, Colo. Rev. Stat. §§24-72-301 *et seq.*, petitioner requested respondent Towle, Chief of Police Department, University of Colorado, to permit inspection of police report C82-61802 about petitioner and records resulting from any actions taken as a result of the complaint. On March 3, 1987, Towle denied the request because of *Uberoi v. University of Colorado et al.*, Boulder County District Court Case No. 83 CV 625-5 which involved federal civil rights claims.

That on March 17, 1987, under the statute petitioner requested respondent Towle to permit inspection of annual reports of University of Colorado Police Department for the past 10 years which lists the various types of investigations, citations issued, and arrests made by the Department. Towle denied inspection because of the litigation involving federal civil rights claims.

That on April 30, 1987, under Colo Rev. Stat. §§24-72-201 *et seq.*, and/or petitioner's status as a faculty member, he requested respondent Fosdick, Chairman of quasi judicial Privilege and Tenure Committee of University of Colorado, to permit inspection of complaints received by the Committee and recommendations, and adjudications issued by it. By a letter

dated May 15, 1987, Fosdick denied the request because the records of the Committee are "personnel records" and therefore exempt from disclosure under the statute even though the court had earlier ruled that the records of the Committee are not "personnel records" and are open to public. *See*, p. a7.

That respondent regents have created "private corporation," The University Improvement Colorado Corporation, which deals with real estate and other assets of the University, in order to avoid federal and state civil rights laws and deny petitioner and his students, who are also racial or ethnic minorities, equal benefits. Regents and respondent Johnson, secretary of the corporation, denied petitioner's requests for inspection of records of the corporation because it is private and not subject to the statute.

That respondent Seebass, in violation of Colo. Rev. Stat. §§24-72-201 *et seq.*, denied access to records about illegal removal of petitioner from Department of Aerospace Engineering Sciences.

Petitioner, *inter alia*, sought declarative and injunctive relief against respondents' conspiracy:

That they denied petitioner inspection of public records in violation of Colo. Rev. Stat. §§24-72-201, *et seq.*, and 24-72-301 *et seq.*, as retaliations for his federal civil rights claims against some of the respondents which stated new federal civil rights claims.

That except for very general and vague principles, the rights and privileges of the faculty are not codified but are determined case by case by Privilege and Tenure Committee. Respondents have kept the precedents secret in order to prevent petitioner from determining his rights in violation of his U.S. Const. I Amend. right to petition Regents, through the committee, for redress of grievances.

That respondents denied access to records of the Committee because of petitioner's Asian Indian Origin which violated 42 U.S.C. §1981.

That respondents deprived petitioner of his I Amend. rights under the color of law, the statute, regulations and custom governing the University and the Committee.

That respondents created University of Colorado Foundation, Inc. and University Improvement Corporation to deny petitioner and his students, who are also racial and ethnic minorities, their rights under Colorado and Federal Law and as "private corporations" they are not subject to political control, in violation of U.S. Const Art. IV, §4, that "the United States shall guarantee to every state in this union a republican form of government."

That respondent created private corporation in violations of Colorado Bill of Rights, which gives people political control over their government, Col. Const. Art. VIII, §5(2) which gives regents exclusive control over the University of Colorado and Colo. Const. Art. XI, §§1 and 2, which prohibit intermingling of public monies with those of private corporations.

Under Colo. Rev. Stat. §24-72-305(7), petitioner also sought penalty of $25 against respondent Towle for each day he denied inspection of police records.

Second show cause hearing

Respondents beg clemency

On August 29, 1988, under Colo. Rev. Stat. §§24-72-204(5) and 24-72-305(7) a second hearing was held for respondents to show cause why they should not permit inspection of public civil and criminal records. A few days before the hearing, respondent Towle supplied to petitioner some papers purported to be *copies* of the records in question. He *never* permitted inspection of the actual records. After the

hearing, Towle's counsel prepared an order which was signed by Judge Sandstead. The order, *inter alia*, states that respondent Police Chief Towle denied petitioner's request for inspection of public records because:

> c. [petitioner] and Defendant University, and specifically, officials of the University Police Department, were engaged in [federal civil rights] litigation over police conduct in this action and Civil Action No. 83 CV 625, Boulder County District Court.
>
> d. The Defendants assert that they took this position in good faith, until Judge Enwall, in Civil Action No. 83 CV 625, ruled that this was not a valid ground for resisting a request under Open Records Act...
>
> f. The Court finds that the Defendants did not act arbitrarily or capriciously and the Plaintiff is not entitled to recover any penalty. *See* pp. a13 - a14.

Judge Richtel had ruled on May 22, 1986, that respondents cannot deny petitioner access to public records because he had sued them to vindicate his state and federal civil rights. *See*, p. a3. Thus, respondents were acting in contempt of the court. Respondents refused to obey trial court orders to disclose the records to petitioner, e.g., they claimed that they did not have space at University of Colorado, Boulder. Therefore, petitioner should go to their counsel's office in Denver and they will transfer the records from Boulder to Denver. That they had shown or waved *copies* of other records in front of petitioner which satisfied the court's orders. In particular, the court ordered disclosure of complaint, against respondent Seebass, filed with Privilege and Tenure Committee. They claimed that the records cannot be found. After the second show cause hearing, the order prepared by their counsel, objected to unsuccessfully by petition and signed by Judge Sandstead concluded:

> The Show Cause Order is discharged as to *all* Defendants and *all* pending claims brought pursuant to C.R.S. §§24-72-201 *et seq.*, are hereby *dismissed*. [Emphasis added. See p. a17.]

Judge Richtel had ruled that records of Privilege and Tenure Committee are open to public because they are not "personnel records." *See* p. a7. Disregarding "law of the case," Judge Sandstead ruled that records of the Committee are in the nature of personnel files more than any other type of file," *see* p. a17, and are therefore exempt from disclosure.

The court granted summary judgment on other claims based on *res judicata* and collateral *estoppel* arising from *Uberoi v. University of Colorado, et al.*, No. 82 M/LW 806, D. Colo. even for claims based on transaction occurring after the date of judgment in 82 M/LW 806.

The court granted summary judgment on the claim which alleged that respondents' creation and operation of University of Colorado Foundation, Inc. and The University of Colorado Improvement Corporation violated U.S. Const. Art. IV, §4, "The United States shall guarantee to every state in this Union a republican form of government," and violated state constitution, Art. II, Art. VIII, §5(2), Art. XI, §§1 and 2 because they involve political questions beyond its jurisdiction.

The court dismissed claims under U.S. Const I and XIV Amends; 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988 because petitioner had failed to state any cognizable claim. *See* pp. a18 - a35.

Summary judgment for all respondents

Respondents moved for summary judgment in their favor. Petitioner filed responsive brief. In several claims, petitioner sought declarative and injunctive relief but no damages that they conspired to violate his state and federal civil rights. The court declared that "civil conspiracy is a tort" and

granted summary judgment for them on these claims because he had failed to give and/or allege compliance with the notice requirement under Colorado Governmental Act, Colo. Rev. Stat. §24-10-109. No notice was required since petitioner did not seek damages in these claims. Moreover, petitioner filed affidavit that he had given proper notice of the complaint. Notice of the amendment to the complaint was given when it was served on them and later they confessed to motion to amend complaint.

Moreover, a state cannot impose its notice requirement on petitioner's federal claims in state court.

The court ruled that respondent police officer Kish's detention of petitioner for 20 minutes, after completion of investigatory stop, to conduct irrelevant enquiry about petitioner's national origin, place of birth and employment history, did not violate petitioner's IV and XIV Amend. rights.

Ex-parte hearing awards of attorney's fees to all respondents for defense of al claims, including claims on which petitioner prevailed

In arriving at summary judgments, Judge Sandstead ruled that injunction issued by his fellow judge, Roxanne Bailin, in another division of the court applied to this case. *See* pp. a35 - a37. The injunction states:

> Mahinder Uberoi is enjoined from representing himself in any manner in the XX Judicial District beginning January 16, 1989, except in post-judgment collection proceedings or appeals.

Judge Sandstead noted that he had disregarded petitioner's papers filed after that date. He ordered that a hearing will be held in September, 1989, to assess attorney's fees against petitioner. He further ordered:

> The Court finds that September hearing [to assess attorney's fees against petitioner] in this action is

> neither a post judgment collection nor an appeal proceedings: thus, it is incumbent upon Plaintiff to obtain counsel if he desires to be heard at that meeting. *See* p. a38.

On August 15, 1989, petitioner filed "Motion to permit Uberoi to fully represent himself in proceedings to tax attorney fees and costs against him." pp. a39 - a41. Petitioner stated, *inter alia*, that prohibition to represent himself is deprivation of property without due process, in violation of XIV Amend. On August 16, 1989, Judge Sandstead scrawled on the face of the motion, "Motion Denied." See the facsimile at a42.

On September 6, 1989, Judge Sandstead held the hearing and fraudulently stated that he "had no communication" from petitioner. In fact he had denied petitioner's motion to represent himself. *See* pp. a43-a44. He twice ruled that the transcript of the hearing will be his order and awarded respondents their attorney's fees of $65,370 for the entire case including their fees for defense of claims on which petitioner prevailed.

Instead of filing transcript of the proceedings, as ordered by the court, respondents prepared a proposed order which authorized additional attorney's fees and costs for respondents' "Motion for Attorney Fees, their preparation for the hearing on the Motion for Attorney Fees and costs for their expert witness, Mr. Mathews." Judge Sandstead signed it. *See* pp. a44 - a45.

Proceedings in Colorado Court of Appeal

The court denied petitioner's motions to assign the case by blind draw to one of its panels and permit oral arguments. Its judgment and opinion restates trial court's judgment. E.g.,

It held that several "claims allege conspiracy to avoid Open Records Act and conspiracy to violate the Constitution... Civil conspiracy is a tort." Therefore, the claims are subject to

the notice requirement of Colorado Governmental, Immunity Act. It denied respondents their attorney's fees for prosecuting the appeal by omitting any reference to fees. On rehearing it added the conclusory statement the petitioner's appeal is frivolous and respondents are entitled to attorney fees for their defense of petitioner's appeal. *See* p. a57.

REASONS FOR GRANTING PETITION

I.

Injunction issued by a coordinate trial court prohibiting petitioner from appearing *pro se* in XX Judicial District of Colorado;' even in a defensive posture, is unconstitutionally broad and inapplicable to the ongoing proceedings in trial court

Trial judge Roxanne Bailin, in another proceeding in Boulder County District Court, on December 27, 1988, entered a written order "prohibiting [petitioner] from filing paperwork of any nature in XX Judicial District except matters relating to appeal or post-judgment proceedings unless he has an attorney who enters his or her appearance in any such case." (p. a36.)

On January 23, 1989, Judge Bailin issued an amended injunction which reads in its entirety:

> It having come to the Court's attention by its rereading the written injunction dated December 27, 1988, that some ambiguity may be present in said order, the Court now amends it to make clear that [petitioner] Mahinder Uberoi is enjoined from representing himself in any manner in Twentieth Judicial District beginning January 16, 1989, except in post-judgment collection proceedings or appeals. (pp. a36 - a37.)

The United States Supreme Court has stated that right of access to courts "is the right conservative of all other rights." *Chambers v. Baltimore & Ohio RR*, 207 U.S. 142, 148 (1907);

"the right of access to the courts is indeed but one aspect of right of petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The court has noted that the right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights, *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967) and that it has "a sanctity and a sanction not permitting dubious intrusion," *Thomas v. Collins*, 323 U.S. 516, 530 (1945). As an aspect of the First Amendment right to petition, the right of access to court shares this "preferred place" in our hierarchy of constitution freedoms and values.

The courts that have limited the court access of *pro se* litigants have not forced litigants to retain a lawyer, but have required them to obtain leave of court before filing a lawsuit. *See*, e.g., *Mayfield v. Collins*, 918 F.2d 560, 562 (5th Cir. 1991); In re *Martin-Trigona* 737 F.2d 1252, 1258-59, 1264 (2d Cir 1984); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983). *In re Green*, 669 F.2d 779, 787 (D.C. Cir. 1981).

However, a court cannot impose conditions so burdensome as to deny a litigant meaningful *pro se* access to the court. *Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1986).

Judge Bailin based her injunction on *Bd. of County Comm'rs v. Winslow*, 706 P.2d 792 (Colo. 1985) cert. denied, 475 U.S. 1018 (1986). It does not appear that any other state court has barred a plaintiff from court unless he hires an attorney. To petitioner's knowledge only one reported federal case has required a *pro se* litigant to hire counsel. *People v. Carter*, 678 F. Supp. 1484, 1491-92 (D. Colo. 1986).

Except for the injunction issued by Judge Bailin, there is absolutely no reported case where the court barred a *pro se* litigant from appearing in a defensive posture.

Moreover, Judge Bailin lacked jurisdiction to issue an injunction affecting this ongoing case before coordinate Judge Sandstead. In issuing summary judgments for respondents, Judge Sandstead expressly ruled on May 2, 1989:

> The injunction issued by Judge Bailin is applicable to this action. Pursuant to the terms of the injunction, the Court has not considered, nor will it consider in the future, any new motions filed *pro se* by Plaintiff after December 16, 1988 or any pleadings filed *pro se* by Plaintiff after January 16, 1989, except as they might relate to post-judgment collecting or an appeal. *See* p. a35.

Petitioner submitted pleadings and motions which were disregarded by Judge Sandstead when he issued summary judgments for respondents. E.g., Motion for leave to file copies of portions of Defendant McCord's deposition cited in Plaintiff's response to motion for summary judgment, filed January 13, 1989; Motion to admit copies of evidentiary exhibits destroyed by the court, etc., filed January 13, 1989.

II.

State court's order expressly prohibiting Asian Indian plaintiff [petitioner] from appearing *pro se* at hearing to assess attorney's fees against him, and award of attorney's fees to respondents for their defense of claims on which petitioner prevailed and for their frivolous pleadings, are willful violations of equal protection and prohibition against deprivation of property without due process clauses of XIV Amend. and I Amend. right to petition government, through courts, for redress of grievances

Judge Sandstead expressly ruled:

> [I]t is incumbent upon Plaintiff to obtain counsel if he desires to be heard at that hearing [to assess attorney's fees against him]. *See* p. a38.

He then denied petitioner's motion to appear *pro se* at the hearing. *See* p. a42. He held the *ex parte* hearing and awarded respondents their attorney's fees for the entire case including those incurred by them for defense of numerous claims on which petitioner prevailed. Thus, Judge Sandstead repeatedly willfully denied petitioner due process and equal protection and I Amend. right of access to court.

> The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend is a denial of due process. *Shelley v. Kraemer*, 334 U.S. 1 (1948)

> Judges who would willfully discriminate on grounds of race or otherwise would willfully deprive citizen of his constitutional rights... must take account of 18 U.S.C. §242. *O'Shea v. Littleton*, 44 U.S. 488, 503 (1974).

Respondent Johnson filed motion to quash service of process on him. Petitioner replied that the motion was frivolous. Respondent Johnson withdrew his motion but was awarded his attorney's fees for filing the frivolous motion and for filing motion to withdrew his earlier frivolous motion.

As another example, respondents filed voluminous briefs that in Judge Richtel's order that:

> the Court's order is stayed until further order of the Court *and* until Supreme Court declines to act on the request of either party for relief from the order. *See* p. a10,

the word *and* should be interpreted as *or*. Trial court rejected such legal scholarship. Respondents were warded attorney's fees for filing such frivolous briefs.

III.

Respondents' retaliations against petitioner for his civil rights law suits against them are interferences with petitioner's I Amend. right to petition government through courts

Respondents denied access to public records because petitioner had sued them to vindicate his civil rights in federal court. Judge Richtel ruled that this was an unlawful reason for denial and ordered disclosure of the records. Subsequently, respondents denied petitioner's requests for disclosure of other public records because he sued them to vindicate his civil rights and produced some copies of the record, a few days before the second show cause hearing and begged for clemency that petitioner may not recover penalties against them for arbitrary and capricious denials. Clearly, respondents were retaliating for petitioner's civil rights law suit against them.

Harrison v Springdale Water & Sewer Com'n, 780 F.2d 1422, 1427-8 (8th Cir. 1986) stated that:

> It has been noted in this Circuit that "access to the courts is a fundamental right of every citizen." *Greenholtz*, 436 F. Supp. at 436. An individual's constitutional right of access to the courts "cannot be impaired, either directly... or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. It is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." *Sanders*, 724 F.2d at 666. The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. *See, e.g., Garland v. Polley*, 594 F.2d 1220, 1223 (8th Cir., 1979); *Hall v. Sutton*, 755 F.2d 786, 787 (11th Cir., 1985); *Matzker v. Herr*,

> 748 F.2d 1142, 1150-51 (7th Cir., 1984) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper."); *Lamar v. Steele*, 693 F.2d 559, 562 (5th Cir., 1982) *cert. denied*, 464 U.S. 821, (1983); *Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1981); *Silver v. Cormier*, 529 F.2d 1261, 163 (10th Cir. 1976). An individual is entitled to "free and unhampered access to the courts." *United States ex rel. Cleggett v. Pate*, 229 F. Supp. 818, 821-22 (N.D. Ill., 1964).

Moreover, the previous complaint against respondents alleged that they violated petitioner's civil rights because of his Asian Indian origin. The complaint here also alleged racial discrimination.

> Retaliation, in racial-discrimination context, can violate 42 U.S.C. §1981, which is provision of civil rights laws governing equal rights under the law. *Sisco v. J.S. Albercini Const. Co.*, 655 F.2d 146 (9th Cir., 1981).

The trial court and Colorado Court of Appeals ignored claims based on retaliation.

IV.

Trial court's requirement of review of its judgment simultaneously by two appellate courts was machination to willfully interfere with petitioner's I Amend. right of access to courts because of his Asian Indian origin

Judge Richtel's ruling requiring review of his order, certified as final judgment under Rule 54(b), by Colorado Court of Appeals and stay of his ruling at least until the Colorado Supreme Court declines to act on the request of either party for relief from the order, was calculated to hinder and impede petitioner's I Amend. right of access to courts.

As expected, Colorado Supreme Court denied petitioner's petition since it has no jurisdiction to suspend a constitutionally firm statute because it displeases a trial judge.

Judge Richtel had ruled:

> But if either side believes that there is some sort of procedural impediment to trying to get a writ from the Supreme Court on this question [that if the legislature were aware of the real problems this statute causes for the University, it would probably change the statute, p. a10] because I have entered a final judgment that somehow affects the ability to get a writ out of the court, then I'll vacate the Rule 54(b) order and just let my rulings stand, if that is what people want. P.- a11.

Following the practice of rotation of judges, the case was assigned to Judge Sandstead who refused to vacate the Rule 54(b) because it was law of the case and Colorado Court of Appeals denied review of Judge Richtel's order because the time to appeal had expired.

Harrison, supra, held that a citizen is entitled to "free and unhampered access to the courts."

V.

Trial court's ruling that petitioner's IV Amend. claim of unlawful seizure based on his 20 minutes detention by respondent police officer *after completion* of investigatory stop was frivolous and respondent may recover his attorney's fees for his defense and Colorado Court of Appeal's ruling that petitioner's appeal of trial court's dismissal of the claim and award of attorney's fees is also frivolous and respondent shall recover his attorney's fees for defense of the appeal, are indications of the extreme prejudice of the courts

Trial court and the Court of Appeals noted in their rulings that petitioner by affidavit, pp. a22 - a54 states:

> The officer stated that my car had crossed Broadway using the right lane on Euclid which lane was only for turning right from Euclid to Broadway. I repeatedly told the officer that there was no such sign to this effect which the officer could confirm by just looking at the proper corner of the intersection. The officer falsely insisted that there was one and issued a warning to me. The foregoing lasted for about 3 to 5 minutes.
>
> The police officer detained me for an additional 20 minutes by asking about my nationality, where I was born, where I worked, what was the nature of my work, etc. I answered all the questions put to me.

An investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *Terry v. Ohio*, 392 U.D. 1, 20 (1968); *Florida v. Royer*, 460 U.S. 491, 500 (1983); *U.S. v. Sharpe*, 470 U.S. 675, 686 (1985).

In willful violation of established law, the courts dismissed the claim and assessed attorney fees against petitioner under Colo. Rev. Stat. §§13-17-101 *et seq.* The attorney's fees in civil rights claims are determined under 42 U.S.C. §1988 and the case law standards developed under §1988 but not under state statute.

Moreover, the state statute and Colo. R. Civ. 11 permit award of attorney's fees to respondents for defense of claims on which petitioner prevailed and for filing frivolous pleadings and do not compensate petitioner for responding to such pleadings. The statute and the rule are unconstitutional since they allow deprivation of property without due process and deny equal protection of law.

Colorado Court of Appeal's award of attorney's fees to respondents for their defense of appeal with conclusory statement that "Defendants... request award of attorney fees... We agree that plaintiff's appeal is frivolous," *see* p. a57, is deprivation of property without due process.

Petitioner's several cases have come before Colorado Court of Appeals. It is aiways denied oral arguments without comment and denied petitioner's motion to assign his cases by blind draw to one of its panels in his presence, while repeatedly assigning his cases so that the same judge wrote the opinions in more than one case.

VI.

Case law of a quasi-judicial body should be open to litigants and prospective litigants who have the right to invoke its jurisdiction

In recognition of the faculty's I Amend. right to petition the government, University of Colorado Regents have created quasi-judicial body Privilege and Tenure Committee to hear formal written grievances from the faculty against officials of the University. The Committee hears testimony of witnesses and cross-examination, receives evidence, and issues its opinion. The opinions of the Committee are not open to public nor to the faculty who as present or prospective litigants have the right to invoke its jurisdiction.

Judge Richtel ruled that privacy interests of faculty members litigating their rights and privilege do not justify keeping the records secret:

> [i]n investigation involving claims of misconduct by University Official, the public interest may well be served by disclosure and prevail over privacy interest. (P. a5)

Judge Sandstead reversed this "law of the case" and ruled that case law of the Committee should be secret to protect the privacy interest of litigants appearing before it.)Pp. a16 - a17.)

As a general matter, case law of quasi-judicial state body should be open to public to assure fair proceedings before

fair tribunals including equal protection and due process appropriate to the particular circumstance.

In any case, case law of the Committee should be open to faculty members who may invoke its jurisdiction so that they may determine their rights and to assure that the Committee provides fair proceedings, equal protection and due process, particularly to faculty members belonging to racial or ethnic minorities or those who hold unpopular views.

> [D]ue process is flexible and calls for such procedural protection as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

VII.

The state statute requiring prior notice of complaint seeking prospective injunctive relief serves no purpose other than to hinder citizen's I Amend. right to petition the government for redress of grievance and is inapplicable to federal claims, and in any case petitioner complied with notice requirement

Court of Appeals affirmed summary judgment on claims alleging "conspiracy to avoid Open Records Act and conspiracy to violate the Constitution." Because "Civil Conspiracy is a tort" and petitioner had failed to give notice under Governmental Immunity Act Colo. Rev. Stat. §24-10-109(1). *See* p. a48.

State notice requirements in federal claims for damages or prospective injunctive relief would unduly interfere with federal action. *Miami Intern. Realty v. Town of Mt. Crested Butte*, 1579 F. Supp. 68 (D.Colo. 1984).

Claims for prospective injunctive relief give adequate "prior notice." Further notice would be duplicative. Moreover, a civil conspiracy is not a tort unless the underlying act, which is the subject of conspiracy, is in itself a tort, some act must be committed by one of the parties in pursuance of the agreement

which is itself a tort." *Law of Torts*, 4th Ed., W.L. Prosser, West Pub. p. 293 citations omitted.

VIII.

Res judicata **or collateral** ***estoppel*** **cannot arise from proceedings held elsewhere without due process nor for claims arising from transactions occurring after the date of judgment in another case**

Due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. *Griffen v. Griffen*, 327 U.S. 220, 232 (1946).

Trial Court dismissed several claims based on *res judicata* or collateral *estoppel* arising from judgment in *Uberoi v. University of Colorado et al.*, 82 M/LW 806, U.S. Dist. Ct. for Colo. That case listed Jim Carrigan as a defendant for his conduct before he became a judge of the U.S. District Court. Under 28 U.S.C. §455(a), *all* judges of the district were disqualified. Nevertheless, Judge Richard Matsch proceeded and thrice ordered and compelled petitioner to prepare pre-trial order when respondents had not even answered the complaint.

Later, Chief District Judge, Sherman Finesilver, selected Judge Lee West of Western District of Oklahoma to handle the case, which was in violation of §455(a) since a disqualified judge may not select or participate in the selection of another judge. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255,1261 (5th Cir. 1983). Moreover, Judge Finesilver had applied, through his friends, to University of Colorado for an honorary degree. A joint committee of the faculty and the regents rejected his application. He still coveted it and was therefore additionally disqualified under §455(a). Judge West dismissed 82 M/LW 806 because petitioner had failed to complete discovery within six weeks after receiving answer to the complaint. The application was resubmitted and Judge

Finesilver was granted honorary degree of doctor of laws after 82 M/LW was resolved in the University's favor.

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) held that judgment of a judge acting in violation of §455(a) violates fundamental due process and must be vacated.

This court does not review factual disputes. There is an exception when the judgment below is in wilful violation of plain facts. Several claims against respondents Fosdick, Gee and Regents are based on the allegation that Fosdick on May 15, 1987, unlawfully denied petitioner's request for inspection of records of Privilege and Tenure Committee. The case 82 M/LW 806 was decided on May 28, 1986, a year before the transaction on which the claims here are based. Therefore, no *res judicata* or collateral *estoppel* can arise.

IX.

Claim under U.S. Const. Art 4, §4, U.S. shall guarantee every state in this Union a republican form of government, are justiciable

Petitioner alleged that Regents created University of Colorado Foundation, Inc. and the University Improvement Corp. to avoid state federal law governing state and local government which violated Art. 4 §4. Trial and Appellate court made the sweeping ruling that claim under the guarantee clause are political questions and outside the jurisdiction of courts. *See* pp. a29, a47, a48.

However, many cases have been adjudicated under this section.

A guarantee by the national authority would be as much leveled against *usurpation of rulers* as against the ferments and outrages of faction and sedition in the community. Hamilton in *Federalist*, No. XXI. [Emphasis added.]

By the Constitution, a republican form of government is a guarantee to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves. *In Re Duncan*, 139 U.S. 449, 461 (1891).

School directors threatened with force to compel recision of their desegregation order were entitled to invoke, *inter alia*, this clause guaranteeing republican form of government, and to appeal to federal courts for protection. *Hoxie School Dist. No. 46 of Lawrence County, Ark. v. Brewer*, D.C. Ark. 1956, 137 F. Supp. 364, affirmed 238 F.2d 91.

We are dealing with aristocratic and monarchial innovations of Regents to take a part of government and make it private and outside the control of the people.

The purpose of this provision of the Constitution [Art. IV, §4] is to protect the people of the several states against aristocratic and monarchial innovations... and to protect them from abolishing a republican form of government (Cooley, Constitutional Limitations [7th Ed.], p. 45). *Van Sickle v. Shanahan*, 1973, 511 P.2d 223, 212 Kan. 426.

Moreover, *Van Sickle* court held that there is precedent for a conclusion that state courts have the power to consider questions arising under the guarantee clause of the Constitution, at 234.

X.

I Amend. right to petition the government and XIV Amend. rights of due process and equal protection require state to maintain orderly and operational courts

Judge Richtel ordered petitioner to file full texts of all non-Colorado citations, because the judges of the court had elected to sell the court library and use the proceeds to finance a computer based legal reference and research system, and he did not agree with the majority decision. He seized petitioner's privileged documents while petitioner was addressing the court. At his direction, the court staff destroyed 35 or so items which were admitted into evidence. Petitioner believes that he was subjected to those burdensome and unlawful practices because of his Asian Indian Origin. Judge Richtel has stated that he does not know of any other case where evidence was destroyed or a party was required to file full text of non-Colorado citations.

CONCLUSION

For these various reasons the petition should be granted.

Respectfully submitted,

Mahinder S. Uberoi, *pro se*

APPENDIX

DISTRICT COURT, BOULDER COUNTY COLORADO

No. 85 CV 2080 Division 2

Minute Order

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Defendants.

On May 23, 1986, the following actions were taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES:

Mahinder Uberoi, Pro Se.
The Defendants, other than McCord and the University of Colorado Foundation, Inc., by Richard Tharp.

This matter came on for closing argument on an Order To Show Cause hearing held pursuant to C.R.S. §24-72-204 on May 22, 1986. Upon oral findings of fact and conclusions of law, Plaintiff's request for disclosure was in part granted and in part denied. A transcript of the Court's oral ruling is attached.

MURRAY RICHTEL, DISTRICT JUDGE

THE COURT: Let the record reflect that we're back in session in 85 CV 2080-2, *Uberoi, vs. The Regents, et al.*

The Court is prepared to rule on the Order to Show Cause hearing.

The Plaintiff has filed a Complaint containing seventeen Claims for Relief. The First through Fifth claims all assert that one or more of the Defendants violated C.R.S. §24-72-201 et seq., when the Defendants denied Plaintiff's request under that Statute. The Plaintiff requested an Order to Show Cause hearing pursuant to C.R.S. §24-72-204(5). After this litigation was instituted, the Defendants, other than the University of Colorado Foundation, Inc., and Charles G. McCord, petitioned this Court for an Order Permitting Nondisclosure under C.R.S. §24-72-204(6). An Order to Show Cause hearing was held on February 11 and 12, 1986, and continued for further evidence on this date. The Plaintiff waived his right to present further evidence on this date, and closing argument was held.

It should be noted that at the Order to Show Cause hearing, the request of the University of Colorado Foundation, Inc., and Charles G. McCord to dismiss the Show Cause Order as against them was granted.

Having considered the arguments of counsel and the evidence and the arguments of Dr. Uberoi, the Court now enters the following ruling and order:

The Defendants have asserted defenses in three broad categories:

One, That based upon ongoing litigation between the parties in Federal Court, that the request for information must be dealt with by the Federal Court in that litigation under the Federal Rules of Civil Procedure related to discovery.

Secondly, That pursuant to C.R.S. §24-72-204(6), disclosure would do substantial injury to the public interest.

And Three, that the requests fall within specific statutory exceptions to disclosure under C.R.S. §24-72-204.

The Court will address each specific statutory exception as applied to each specific request in this ruling. However, before turning to the specific documents, initially, the Court will address the first two categories of defense.

As relates to the Federal litigation, there is nothing in the Statute to suggest that by engaging in litigation with a public entity covered by the statute a person forfeits rights otherwise available under the Statute. That is, if information is otherwise available under the Statute, there is no statutory exception permitting nondisclosure. Certainly, the mere existence of Federal Rules of Discovery which do not prohibit disclosure cannot support a claimed exemption under §24-72-204(1)(b). The Court does not believe that a party's right to information under §24-72-201 et seq. are either increased or decreased by his status as a litigant in another matter with the Defendants. See by analogy *Comstock International, Inc., vs. Export-Import Bank of the US*, 464 F Supp. 804 (1979), and *Local 30, vs. NLRB*, 408 F Supp. 520 (1976), interpreting the Freedom of Information Act.

Alternatively, Defendants seem to argue that Plaintiff's attempts to enforce his rights under C.R.S. §24-72-204 have placed such a burden on University counsel litigating with the Plaintiff as would constitute substantial injury to the public interest under C.R.S. §24-72-204(6). That argument is without merit, as are all other claims in the second broad category of defense, which seem to rest on the argument that the burden placed on the Defendants in order to comply with the Plaintiff's request would do substantial injury to the public interest. Those claims are covered by paragraphs one through six of the Defendants' Petition for Order Permitting Nondisclosure. In the Court's view, that argument is not available under C.R.S. §24-72-204(6). That section is designed to permit nondisclosure of information when disclosure of the information would affect the public interest. It is a *content* related exception having nothing whatever to do with the manner of disclosure or the effort necessary to effectuate disclosure. If the mechanism of disclosure is burdensome to a public entity, then the official custodian is free to adopt

regulations which are, "reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian in his office," C.R.S. §24-22-203(1). Here the Defendants have adopted no such regulations. Such regulations could deal with the problems raised by paragraphs three through six of the Petition for Nondisclosure. Thus, as to the second broad category, the Court concludes that the burden of producing the requested material is not a matter to be dealt with under §24-72-204(6).

As to paragraphs seven and eight of the Petition for Nondisclosure, the Defendants assert that disclosure of the contents of requested material as opposed to the mechanics of disclosure would work substantial injury to the public interest. The Statute provides and the Defendants concede that they bear the burden of proof in that regard. The Court concludes that as to each of the requested items, that the burden has not been met by evidence introduced at the trial.

The Court uses the word "evidence" in the sense of adjudicative fact, and counsel for Defendant seem to agree with that characterization in closing argument. The reason is that the Court believes that the legislature has mandated a policy of openness under C.R.S. §24-72-201 et seq. subject to very limited exceptions. Exceptions beyond the specific must be established to the satisfaction of the Court under C.R.S. §24-72-204(6), but such exceptions may only be recognized when the failure to do so would result in substantial injury to the public interest. The Court does not believe that an institution may assert as a general matter that certain information falls within that category. For example, the Court recognizes the important function of the Privilege and Tenure Committee in the University setting. There may be times when there would be substantial injury to the public interest to disclose the Committee's records. On other occasions, the opposite may be true. For example, it may be that a file contains allegations of serious improprieties by a faculty member which are established to be unfounded; in such circumstance, the faculty member's privacy interest may

outweigh the public interest. On the other hand, in an investigation involving claims of misconduct by University officials, the public interest may well be served by disclosure and prevail over privacy interests. Since the legislature carved out only narrow exceptions to the policy of openness, a public entity seeking to justify nondisclosure under C.R.S. §24-72-204(6), must do so with evidence specifically demonstrating substantial injury to the public. Here as to each specific item, the evidence does not establish such substantial injury.

The Court will now address each individual request for information. C.R.S. §24-72-204(4) provides that if a custodian denies access, an applicant may request a statement of reasons and the custodian shall forthwith respond citing applicable laws and regulations. In this case, in each of its requests, the Plaintiff as applicant sought to have the Defendants state the reason for their refusal. Although not here called upon to define the precise meaning of the term "forthwith," the Court holds that in this litigation, the Defendants are bound by the grounds stated in each response to a request made by the Plaintiff and may not now assert new grounds.

Alternatively, the new grounds which are all related to the public interest are for reasons previously stated, not supported by the evidence in the case.

As to the request of June 16, 1985, to the President Baughn, the asserted basis for denial was the existence of the federal litigation. As previously noted, that argument is without merit. Therefore, the Defendants are directed to comply with that request within ten days of this date, to the extent the documents exist.

In the request of June 16, 1985, to Dean Seebass, the Plaintiff seeks documents relating to evaluation of his performance at the University. In essence, this request was denied because it sought letters of reference. Letters of reference may not be obtained even by the person interested under C.R.S. §24-72-204(3)(a)(III); yet, performance ratings may be obtained under C.R.S. §24-72-204(3)(a)(II). The

evidence in this case established that in an academic setting, the review of employment status is a never-ending process. The issue, thus, becomes whether in such a process information received is more akin to a performance rating or to letters of reference. In the Court's view, the legislature exempted letters of reference from disclosure in order to ensure that public officials charged with making decisions, "concerning employment," would have as accurate information as possible available to them in making those decisions. Opportunities for accuracies are enhanced by candor and opportunity for candor are enhanced by confidentiality; and thus, the goal of making accurate information available to the decision maker is enhanced by confidentiality of letters of reference. Since the phrase "letters of reference," is modified by the words, "concerning employment," and not by the words, "concerning hiring," the Court believes that letters of reference received in a post-hiring evaluation "concern employment." but why aren't such letters as those contained in Exhibit 34a performance evaluations rather than letters of reference? In the Court's view, information received in a post-hiring process from persons who do not have a responsibility to evaluate performance as part of their jobs with the public entity, are letters of reference, whereas similar information from persons within the public entity are performance ratings. The Court believes that the legislature's goal was to encourage those with no duty to disclose to provide candid information. However, with respect to those persons employed by a public entity, the duty to provide candid information is part and parcel of their positions as public employees. Thus, the Court concludes that post-employment evaluations by nonemployees of the disclosing entity are letters of reference and not subject to disclosure. Exhibit 34a falls within that category and needs to be disclosed.

The Court is not now required to address the question of whether or not in-house evaluations might in some circumstances fall within an exception under §24-72-204(6).

Another request of June 16, 1985, seeks performance ratings and statistical analysis of A.R. Seebass. The evidence establishes compliance with that request.

Request Number Four seeks the records of the Committee on Privilege and Tenure related to A.R. Seebass. The evidence establishes that the documents in question relate to the grievance process surrounding privilege and tenure, and that the Defendants consider these to be personnel matters. The record does not reflect that these documents have a bearing on hiring, rehiring and salary decisions. The Court believes that the legislature did not contemplate that any matter related to personnel or performance was included within the phrase "personnel files." It did not use the phrase "personnel matters," or any other language to suggest the broad interpretation now advanced by the Defendants. Thus, the Court concludes that the documents requested in Request Number Four are not personnel files; and therefore the Defendants are required to produce the requested documents within ten days of this date.

As noted earlier, the Court is not unmindful of the fact that under some circumstances there might be a public interest exception for this kind of information; however, the Defendants' proof in this case does not establish the exception, nor in the Court's view was the claim for exception on that ground asserted in a common manner.

A fifth request dated June 16, 1985, requests Chancellor Shull to disclose performance ratings of Milton Lipetz and statistical analysis relating to that performance. In his response dated July 16, 1985, Chancellor Shull relied upon the existence of pending federal legislation. As discussed above, that argument is without merit, and no other exception has been established by the evidence. Therefore, the requested document shall be supplied no later than ten days from this date, to the extent they exist.

A sixth request dated July 3, 1985, to President Gee seeks performance ratings of Chancellor Shull and President Weber as well as statistical analysis. President Gee's response, dated July 16, 1985, declined disclosure based upon the existence of pending federal legislation. As noted, that argument is without merit and no other exception was

established by the evidence. Therefore, those documents shall be supplied no later than ten days from this date, to the extent they exist.

Three additional requests are to Peter Dietze dated August 1, 1985, to David Sutherland dated August 1, 1985, and to H.H. Arnold dated August 2, 1985. The response contained in the letter of Ted Ayers dated August 12, 1985, in essence, relies on the existence of the federal legislation to deny disclosure. As noted, that is an improper basis for nondisclosure and no other basis for nondisclosure has been established by the evidence. Therefore, any documents not previously discussed in the above Order shall be disclosed within ten days of this date, to the extent they exist.

Plaintiff's final request dated August 19, 1985, seeks disclosure of Chancellor Shull's appointment calendar. The Court agrees with the Defendant that such calendar is not a public record.

Thank you. We're in recess.

[Transcript of the court's ruling from the bench on May 22, 1986.]

University of Colorado

President's Office

January 29, 1970

Memorandum to All Deans, Department Chairmen, and Directors

Subject: Policy Related to the "Open Records Act" and the University of Colorado

The "Open Records Act," An Act Providing for the Inspection of Public Records, as passed by the General

Assembly in 1968 and amended in 1969, has been given legal interpretation by John P. Holloway as Resident Legal Counsel in a memorandum under date of June 11, 1969.

It shall be the policy of the University of Colorado to observe the requirements of this Act.

The "official custodian" (the person responsible for the maintenance, care and keeping of the records, e.g., the Secretary of the Regents, Vice Presidents, Deans, Directors, Treasurer, Controller, Counsel, etc., or their designated staff officers) shall be responsible for internal access and use of such records.

External requests for information or access to records, e.g., from government officials, from members of the general public, from press, radio, and television, from corporations or businessmen, etc., shall be referred, if deemed desirable by the "official custodian," to the Office of Public Information, with recommendations as to disposition. Supporting reasons should accompany the recommendations.

Any questions in regard to interpretation of the Act shall be referred to Resident Legal Counsel.

F.P. THIEME - President

DISTRICT COURT, BOULDER COUNTY, COLORADO

No. 85 CV 2080 Division 2

Minute Order

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,

Defendants.

On June 16, 1986, the following actions were taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES:

Mahinder Uberoi, Pro Se,
The Defendants, other than McCord and the University of Colorado Foundation, Inc., by Richard Tharp.

This matter came on for hearing on June 13, 1986, on the motions of all affected parties to have the Court reconsider its ruling of May 22, 1986. Upon oral conclusions of law, the motions were denied. The Court expressly determines pursuant to C.R.C.P. 54(b) that there is no just reason for delay of entry of judgment on that order and judgment should enter forthwith. However, pursuant to C.R.C.P. 62(d), the Court's order is stayed until further order of the Court and at least until the Supreme Court declines to act on the request of either party for relief from the order.

MURRAY RICHTEL, DISTRICT JUDGE

THE COURT: This is a very difficult and frustrating case for me. It's difficult and frustrating for me because my sense is that this statute reeks real havoc in the academic context of the University of Colorado. I'm frustrated because I believe that the statute as I have interpreted it causes real problems for the University. And I believe that if the legislature were aware of the real problems that this statute causes for the University, it would probably change the statute. But I don't have any sense that the intention of the legislature at the time that it passed this statute was to treat the University any differently from any other institution because they simply amended the statute in response to the Plaintiff's case in the Supreme Court to include the University as an institution. So what makes the case frustrating for me is that

I'm dealing with a statute that I just don't think the legislature would have passed had it thought about it as far as the impact on the University. But I don't think that as a judge I can construe the statute that way. That seems wrong to me. There is a pull that I have to construe personnel file to mean any document having any bearing on hiring, rehiring and salary decisions. That seems to be reasonable to me. And if that is a proper definition, then I think many of these documents are, in fact, personnel files. Although, certainly not the P and T [Privilege and Tenure Committee of University of Colorado] records.

But I still can't get by performance ratings because I just don't know how I can say that evaluations of administrators are anything other than performance ratings, even though they are subjective and even though Dr. Volsky testified that the legislature meant that the exception should only apply to objective kind of ratings because the statute, as I said, was passed with no special exceptions for the University.

I don't feel comfortable as a trial judge defining out of the phrase performance ratings something which appears to me to be so clearly a performance rating. So I'm not going to reconsider either side's motion. But I am going to certify the ruling on the order to show cause as a final judgment under Rule 54(b) and find there is no just reason for delay and enter judgment on the order to show cause; then, pursuant to Rule 62(h), I'm going to grant a stay on that judgment.

Now, that is what I really think needs to happen because there is a substantial public interest in having documents available if they are supposed to be available, but a substantial public interest is defeated if the documents are disclosed and they shouldn't be disclosed. Thus, I'm granting the stay. But if either side believes that there is some sort of procedural impediment to trying to get a writ from the Supreme Court on this question because I've entered a final judgment and that somehow that affects the ability to get a writ out of the court, then I'll vacate the Rule 54(b) order and just let my rulings stand, if that is what people want. But I think I

better do it that way because that gives me the authority to grant the stay, at least until the parties have sought a writ from the Supreme Court.

The bottom line of what I'm saying is, I just don't know how I can limit the clear language of performance and ratings to objective material, even as much as I would like and as much as I think that would be an extremely sensible way for a legislature to approach the problem when dealing with open records in the academic setting.

We're in recess.

[Manuscript of the court's ruling from the bench on June 13, 1986.]

DISTRICT COURT, COUNTY OF BOULDER, COLORADO

No. 85 CV 2080-2

ORDER DISCHARGING ORDER TO SHOW CAUSE AND DISMISSAL OF CLAIMS

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Defendants.

The above-referenced matter came before the Court for hearing on the Order to Show Cause issued by the Court on April 10, 1988, pursuant to §24-72-204(5), C.R.S. (1982 Repl. Vol.).

The Court, having read the file and the briefs of the parties, and having heard the evidence and statements of the parties, hereby funds, concludes and orders as follows:

1. As to Defendant Jerry L. Johnson, Secretary of The University Improvement Corporation, the Court finds that Johnson was not served with the show cause order; therefore the show cause order is discharged as to Defendant Johnson, and all claims against Johnson under C.R.S. §24-72-201, *et seq.*, are hereby dismissed.

2. As to the other Defendants who are subject to the show cause order:

a. In February and March of 1987, Plaintiff made written requests to John Towle, Chief of the University of Colorado Police Department, pursuant to C.R.S. §24-72-301, to inspect the following documents:

> Police department report C82-61802; and Annual Reports of University of Colorado Police Department for the past ten years which list the various types of investigation, citations issued and arrests made by the Department.

b. Chief Towle initially responded to these requests by asserting that since the Plaintiff, the applicant, was in litigation with the University and the Police Department, the information should be sought through the discovery rules and not by *ex parte* contact with police department officials.

c. At the same time the denial was made, the Plaintiff and the Defendant University, and specifically, officials of the University Police Department, were engaged in litigation over police conduct, in this action and Civil Action No. 83 CV 625, Boulder County District Court.

d. The Defendants assert that they took this position in good faith, until Judge Enwall, in Civil Action No. 83 CV 625, ruled that this was not a valid ground for resisting

a request under the Open Records Act. Thereafter, the Defendants claim that the documents have been available for inspection, but that the Plaintiff has not appeared at the Defendants' office to inspect them.

e. In his testimony and offer of proof, the Plaintiff did not deny that he has not attempted to inspect the records since the April 6, 1987 ruling, and did not deny the Defendants' claim that he has since been provided with copies of the records in question. The Plaintiff's testimony and offer request that the Court find that the Defendants' failure to grant excess of one month, was arbitrary and capricious and it should be the subject of a $25 per day penalty.

f. The Court finds that the Defendants did not act arbitrarily or capriciously and that the Plaintiff is not entitled to recover any penalty.

g. On April 30, 1987, the Plaintiff requested of the office of Dean Seebass for the Department of Aerospace and Engineering the opportunity to inspect and copy the following documents:

> Minutes, agenda and all records of all meetings of the Department of Aerospace and Engineering Sciences; and all meetings of committees and subcommittees of the Department, which meetings were held since September 1, 1987 to date. Surveys conducted by any one in the College of Engineering about my equipment, books, academic and research material which I reported to you as missing or misplaced. Formal or informal votes conducted and/or opinions obtained on my request for reinstatement in Aerospace Department from which I was illegally removed and my requests to teach in the Department and to have access to space, office and laboratory staff and to all other privileges of a tenured Professor in the Department.

h. Dean Seebass responded that the documents requested would be made available at the office of the University counsel.

i. The Plaintiff did appear at the University Counsel's office to inspect the documents in question. He alleges he was then told by Rosemary Augustine, representative of the University Counsel, that some of the documents requested were not being made available. Rosemary Augustine testified that no such statement was made, and that she believed all documents covered by the Plaintiff's request were made available. The Plaintiff testified that he believed certain documents were missing, namely minutes of subcommittees of the Department, and a survey conducted concerning Plaintiff and activity taken with respect to the Plaintiff by the Department. While the Court has concerns about the existence of the latter document, and whether it has been provided, the Court finds that Plaintiff has failed to show by a preponderance of the evidence that the Defendants have not complied with the Open Records Act.

j. On April 30, 1987, the Plaintiff requested in writing of Defendant Lloyd Fosdick, then Chairman of the Privilege and Tenure Committee of the University of Colorado Faculty Senate, the opportunity to inspect the following documents:

> All complaints and/or grievances from the faculty or administration received by the Privilege and Tenure Committee (P&T), minutes of the committee and its subcommittees and all communications received by the said committees from any sources; and reports, recommendations, releases, compromises and adjudications issued by P&T and/or its committees.

k. Defendant Fosdick responded to this request as follows:

> [R]elease of these confidential personnel records would violate individual rights of privacy protected by

common law; interfere with the public interest in protecting the University of Colorado's internal grievance resolution mechanism; and do substantial injury to the public interest.

1) At the hearing, the Defendants offered testimony by Walter Skurnick, Chairman of the Committee of Privilege and Tenure for five years. Dr. Skurnick testified that the Privilege and Tenure Committee's function is to investigate grievances concerning terms and conditions of employment, including academic freedom within a department, grievances over the amounts of merit increases, the granting or denial of tenure, and other matters related to employment; that the Committee's authority is limited to making a recommendation to persons having authority [to] act on such personnel matters; that the procedures utilized by the Committee are to be able to afford a more meaningful process of inquiry and recommendation in an academic environment that results from such procedures and the administration of such a system by members of the faculty rather than administrators. Dr. Skurnick testified that over the years, all proceedings of the Privilege and Tenure Committee have been confidential and that all participants have been promised that their statements used in evidence would remain confidential; that the Committee's findings and recommendations would likewise remain confidential; and that the file containing documents on each grievance handled by the Committee is marked "Confidential Personnel Matter." Dr. Skurnick also testified that without confidentiality, the willing participation of parties and witnesses would be seriously inhibited and that the Committee's ability to gather information and generate a meaningful recommendation would be inhibited.

m. The Court finds and concludes that the documents requested by Plaintiff concerning the Privilege and Tenure Committee are privileged pursuant to C.R.S. §13-90-107(e). Inasmuch as the Court believes disclosure of these documents would seriously interfere with the Privilege and Tenure Committee's function of gathering information and rendering a meaningful recommendation and thereby

contravene the public interest. The Court further finds that disclosure of these documents would constitute an unwarranted invasion of the privacy of individuals involved in the proceedings. The Court also concludes on the basis of the evidence presented at this hearing that the documents generated by the Privilege and Tenure Committee in formulating a recommendation for personnel action are in the nature of personnel files, more than any other type of file and therefore are "personnel files" within the meaning of C.R.S. §24-72-204(3)(a)(II), which exempt such records from disclosure.

n. For all of the foregoing reasons, the Court finds that the Defendants have complied with the reasonable requirements of the Open Record Act, and that with respect to the documents described in paragraph 2(j), the records are exempt from disclosure, or in the alternative, that disclosure of these documents would do substantial harm to the public interest because it would violate a statutory privilege and invade the privacy of individuals involved.

3. The Show Cause Order is discharged as to all Defendants, and all pending claims brought pursuant to C.R.S. §24-72-201, *et seq.* are hereby dismissed.

4. The Court has, as part of its ruling, permitted the Plaintiff thirty (30) days in which to comment upon or object to this Order, which has been prepared by defense counsel at the request of the Court.

DONE IN OPEN COURT this 30th day of March, 1988.

By the court:
MORRIS SANDSTEAD
District Court Judge

CC: M. Uberoi (mail): J. Marcus Painter (Relay): B. Rich (Mail): T. Kelley (mail).

The above and foregoing were placed into the normal mailing process to the persons or attorneys indicated. Date April 3, 1989. By CR.

DISTRICT COURT, COUNTY OF BOULDER, COLORADO

No. 85 CV 2080, Division 2

RULING AND ORDER

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Defendants.

On March 30, 1989, the following actions were taken on the above-captioned case and the Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES: None.

I.
INTRODUCTION

This matter is before the Court on the Summary Judgment Motion of Defendants University of Colorado Board of Regents, Charles M. Abernathy, Jr., Richard A. Bernick, Peter C. Dietze, Lynn J. Ellins, Hugh C. Fowler, Sandy F. Kraemer, Norwood L.. Robb, Roy H. Shore, David K Sunderland, Harry H. Arnold, E. Gordon Gee, Harrison Shull, Milton E. Lipetz, A. Richard Seebass, Ted D. Ayres, W.A.E. Skurnick, John Kish, Lloyd Fosdick, John Towle, and Ben Rich. Plaintiff has responded and Defendants have replied. Having considered the pleadings, the Court enters the following ruling and order.

Pro se Plaintiff brings suit against the named Defendants on several common law tort claims, as well as various alleged civil rights violations. Plaintiff's complaint has been amended once. All references to Plaintiff's claims in this ruling and order correspond with the numbering of Plaintiff's amended complaint.

Plaintiff also asserts several claims under the Colorado Open Records Act. These claims are not addressed in Defendants' motion for summary judgment. The Court's ruling on April 10, 1988, after hearing disposed of these matters.

In total, Plaintiff asserts 28 claims for relief against Defendants. The Claims arise primarily from two distinct factual scenarios. One scenario involves the denial by Defendants of Plaintiff's request to inspect the records of the University of Colorado (University), The University of Colorado Foundation (Foundation), and the University of Colorado Improvement Corporation (Corporation) under the Colorado Open Records Act. The other scenario involves an incident on June 18, 1985 when Plaintiff was stopped by Defendant Kish, a University of Colorado Police Officer, for a traffic violation.

Defendant's motion presents several legal theories upon which summary judgment may be granted. Many of Defendants' arguments relate to numerous claims. Any one of Defendants' theories may be sufficient in itself to dispose of certain claims. The Court, however, has chosen to rule on each theory. The effect of the Court's decision is that many claims are dismissed on more than one ground.

II.
STANDARD OF REVIEW

Summary judgment is a drastic remedy which is warranted only upon a clear showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Ellerman v. Kite*, 625 P.2d 1006 (Colo. 1981). The trial court must resolve all doubts as to the existence of an issue of fact against the moving party. *Jones v.*

Dressel, 623 P.2d 370 (Colo 1981). Once the movant makes a convincing showing that genuine issues of fact are lacking, the opposing party cannot rest upon the mere allegations or denials in his or her pleadings but must demonstrate by specific facts that a controversy exists. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218(1970). Defendants' motion is measured against this standard.

III.
MERITS

A.
WHETHER PLAINTIFF'S CLAIMS NUMBERED XX, XXIV, XXV, AND XXIV SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE COLORADO GOVERNMENTAL IMMUNITY ACT.

Tort claims against public entities and their employees are subject to the notice provisions of the Colorado Governmental Immunity Act. §24-10-101, et seq., C.R.S. These provisions as enacted at the time of the filing of Plaintiff's complaint require a plaintiff to serve notice of a claim on a government defendant as a condition precedent to bringing suit. *Jones v. Northeast Durango Water District*, 622 P.2d 92 (Colo. App. 1980). Plaintiff's claims numbered XXII, XXIV, XXV, and XXVI while inartfully drafted are deemed by the Court to allege a civil conspiracy to deny Plaintiff certain Colorado constitutional and statutory rights. Plaintiff's claims are subject to the notice provisions of the Colorado Governmental Immunity Act.

Plaintiff has submitted no evidence to the Court that Defendants were served with notice of Plaintiff's claims numbered XXII, XXIV, XXV, and XXVI. Having failed to comply with the Colorado Governmental Immunity Act, these claims are dismissed against all Defendants, except Defendant Johnson. Defendant Johnson is the Secretary of the University of Colorado Improvement Corporation. The Corporation is a private entity; therefore, Defendant Johnson is not protected by the Act.

B.

WHETHER PLAINTIFF'S CLAIMS NUMBERED VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XXII, XXIV, XXV, AND XXVI SHOULD BE DISMISSED FOR FAILURE TO PLEAD COMPLIANCE WITH THE COLORADO GOVERNMENTAL IMMUNITY ACT.

Conditions precedent are to be generally averred in a complaint. C.R.Civ. P. 9(c). Failure to aver compliance with a condition precedent or waiver of the condition subjects a claim to dismissal at any stage of the proceedings. *Jones, supra*. Notice of a tort claim is a condition precedent to bringing suit against a public entity or its employee. §§24-10-109 and 24-10-118, C.R.S.

Plaintiff's claims numbered VI, VII, VIII, as well as claims numbered XXII, XXIV, XXV and XXVI are deemed by the Court to be civil conspiracy claims. Claims numbered IX, X, XI, XIII, XIV, and XV are clearly identified by Plaintiff as common law tort claims. The Court accepts this characterization. Plaintiff's complaint does not contain any averment of the performance of the notice requirement. Having failed to comply with Rule 99(c), Plaintiff';s claims numbered VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XXII, XXIV, XV and XXVI are dismissed against all Defendants, except Defendants Johnson and McCord who are not protected by the Act.

C.

WHETHER PLAINTIFF'S TWELVETH CLAIM PRESENTS A GENUINE ISSUE OF MATERIAL FACT

Plaintiff alleges that the actions of Defendant Kish during a routine stop for a traffic violation are actionable under 42 U.S.C. 1983. To impose §1983 liability, Plaintiff must establish that the conduct complained of was committed by a person acting under color of state law, and such conduct deprived Plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Shaw v. Neece*,

727 F.2d 947, cert. denied 104 S. Ct. 2358, 466 U.S. 976, 80 L.Ed.2d 830 (C.A. Colo. 1984). Defendant Kish is entitled to qualified immunity if he acted in good faith and with a reasonable belief that his conduct was lawful. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Plaintiff by affidavit states,

> The officer stated that my car had crossed Broadway using the right lane on Euclid which lane was only for turning right from Euclid to Broadway. I repeatedly told the officer that there was no such sign to this effect which the officer could confirm by just looking at the proper corner of the intersection. The officer falsely insisted that there was one and issued a warning to me. The foregoing lasted for about 3 to 5 minutes.
>
> The police officer detained me for an additional 20 minutes by asking about my nationality, where I was born, where I worked, what was the nature of my work, etc. I answered all the questions put to me.

Defendant by affidavit states that Plaintiff was stopped for illegally passing on the right. Plaintiff was given a verbal warning. The stop lasted approximately 2 minutes. Prior to the incident, Defendant had never met nor heard of Plaintiff. Defendant's actions were not undertaken at the behest of any other party.

Accepting as true Plaintiff's version of the encounter with Defendant, the Court cannot find that the incident was sufficiently egregious to rise to the level of a constitutional deprivation. Clearly, no construction of the facts implicates the First, Ninth or Tenth Amendments to the U.S. Constitution. With regard to the Fourth and Fourteenth Amendments, the evidence before the Court establishes that Defendant's actions were reasonable and undertaken in good faith. At most, all that Plaintiff has shown is that Defendant was mistaken as the actual designation of the right turn lane. Such a mistake amounts to no more than a claim for negligence. Negligence

is not actionable under §1983. *Daniels v. Williams*, 474 U.S. 327 (1986). Additionally, Plaintiff has presented no facts which would suggest that Defendant knew that his actions would violate Plaintiff's constitutional rights. Construing Plaintiff pro se's complaint liberally, the Court finds that no genuine issues of material fact exists. The Court is therefore compelled to grant Defendant's summary judgment motion with regard to claim number XII. See *Wood v. Strickland*, 420 U.S. 308 (1975).

D.

WHETHER THE DOCTRINE OF RES JUDICATA BARS PLAINTIFF'S CLAIMS NUMBERED VI, VII, VIII, XIX, XX, XXIII, XXIV, XXV, XXVI, XXVII, AND XXVIII.

In 1982, Plaintiff filed a complaint in the United States District Court, for the District of Colorado. The 85 page complaint set forth in excruciating detail certain activities of the University of Colorado, its Board of Regents, faculty members and Privilege and Tenure Committee from approximately 1962 through 1981. These activities, according to Plaintiff, constituted a conspiracy to discriminate on the basis of race, color, national origin, sex and naturalized citizenship; a conspiracy to deny due process; a conspiracy to interfere with Plaintiff's pre-engineering program for women and minorities; a conspiracy to lockout Plaintiff from his laboratory; a conspiracy to deny facilities and destruct Plaintiff's research in progress; a conspiracy to prevent Plaintiff from teaching; a conspiracy to exclude Plaintiff from higher positions; a conspiracy to deny Plaintiff's First Amendment right of free expression through creative research; Fourteenth Amendment deprivations; tortuous interference with Plaintiff's employment contract; libel; and violation of 42 U.S.C. §§1981, 1983, 1985, and 1986. The complaint was amended 3 times to keep the allegations current through the 1985-86 academic year. The action was dismissed with prejudice on May 28, 1986 for Plaintiff's failure to comply with discovery and pre-trial orders of the court.

The Honorable Lee R. West, presiding in Plaintiff's federal action stated, "The Court finds that plaintiff pro se's case should be dismissed with prejudice because the plaintiff pro se's condemnatious conduct throughout the pendency of this case demonstrates vexatious and dilatory intent. The plaintiff pro se has sabotaged this Court's management of the preparation of this case for trial, thereby violating the intent and purpose of Rule 16 of the Civil Rules of Procedure. He has failed to make or cooperate in discovery, and is therefore subject to the sanctions provided for by Rule 37 of the Civil Rules of Procedure. As a result, he has also failed to comply with the federal rules and orders of this Court. Therefore, his case is also subject to dismissal pursuant to 41(b) of the Civil Rules of Procedure. This Court concludes inevitably that plaintiff pro se did not comply with its orders because he chooses to harass the Defendants by deliberately forcing them to defend the lawsuit without the benefit of any normal or reasonable safeguards. The conclusion is inescapable, he does not seek a fair trial on the merits, but only to punish the Defendants for disagreeing with him on any matter, important or unimportant. This Court will simply not allow the plaintiff to burden it or the Defendants with such an endless general attack without any terms or conditions, without in any respect to define, narrow or reasonably limit his complaint. This Court will not be a party to plaintiff pro se's litigation blackmail. While this Court has devoted an extraordinary amount of time to this case, no case should require the amount of time insisted upon by the plaintiff pro se. Plaintiff pro se's demands, if met, would make a mockery of the court system. The action is therefore dismissed as frivolous and vexatious."

Res judicata is the legal method by which parties are prevented from indulging in endless prosecution of a claim. It is the means by which the legal system says, "Enough is enough!" For res judicata to apply there must be an adjudication on the merits in a previous legal action. *Wells v. Premier Industrial Corp.*, 691 P.2d 765 (Colo. App. 1984). Res judicata is not applicable in those cases where the previous litigation resulted in dismissal for lack of jurisdiction, failure to prosecute, failure to file a complaint or failure to join an

indispensable party. *O'Done v. Shulman*, 124 Colo. 445, 238 P.2d 1117 (1951). Such is not the case at bar. The Court holds that a dismissal with prejudice for failure to comply with discovery and pre-trial orders is an adjudication on the merits sufficient to warrant the application of res judicata. See Fed. R. Civ. P. 41(b), 16(f), 37(b)(2)(C); Colo. R. Civ. P. 41(b), 16(f), 37(b)(2)(C); *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962). Any other decision in this case would unreasonably and undeniably subject Defendants to endless litigation. This result the doctrine of res judicata seeks to prevent.

Res judicata is applicable when there is an identity of parties, capacity and subject matter between prior and subsequent litigation. *Miller v. Lunnon*, 703 P.2d 640 (Colo. App. 1985). Plaintiff's federal and state actions name various University employees as Defendants. The allegations made against the employees in both suits pertain to the actions taken by the Defendants as officials of the University of Colorado. Many of the Defendants in the present litigation were named by Plaintiff as Defendants in the 1982 federal action. Other Defendants in the federal case have not been named in the case at bar because of a change in the actual composition of the University faculty, Board of Regents, and Privilege and Tenure Committee. Plaintiff attempted to amend his federal case to add new Defendants as the composition changed. Plaintiff's motion was denied. The result of the change, however, is reflected in Plaintiff's present complaint.

The major difference between the two complaints is the naming of the University of Colorado Foundation and the University of Colorado Improvement Corporation as Defendants in the present action. Plaintiff names these defendants as the conduit through which the University and its employees engage in legally prohibited activities. The facts alleged against these organizations are substantially identical to those made against the university in the federal action. Clearly, the addition of the University of Colorado Foundation and The University Improvement Corporation is merely for the purpose of alleging the same facts through different parties.

Res judicata bars relitigation of claims previously adjudicated notwithstanding the naming of additional Defendants in any subsequent litigation. All that is required is that the plaintiff and the claims be identical. *Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1981). cert. denied, 450 U.S. 913 (1981). In the present complaint, Plaintiff alleges that Defendants engaged in various conspiracies to deny due process of law, equal protection and other rights guaranteed by the Colorado and federal constitutions. These claims are predicated upon the alleged racist motives of Defendants. Plaintiff's federal complaint sought relief under similar allegations. The Court finds the claims to be sufficiently identical for the purpose of applying the doctrine of res judicata to the action at bar.

An identity of subject matter exists when the claims in both actions arise from the same transaction or series of transactions. The same natural grouping or common nucleus of operative facts may also be considered an identity of subject matter. *Restatement Second of Judgments.* §§24,25. If the relevant facts stem from "acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as public convenience may require that they be dealt with in the same action." *Id.*, comment d, at p. 201. A substantial overlap of relevant facts is a sufficient basis for supporting a finding of identity of subject matter. *Id.* While Plaintiff has since 1982 learned the art of brevity in drafting a complaint, the facts supporting the current complaint are not sufficiently dissimilar to avoid the application of res judicata.

The Court finds that there is a substantial overlapping of relevant facts between Plaintiff's federal and state actions. For example: In the federal complaint, Plaintiff alleged a conspiracy among University employees and officials to interfere with his high school pre-engineering program for women and minorities. The conspiracy involved the failure of the University to fund the program. In the present action, Plaintiff realleges the same facts. The significant difference

between the factual allegations is the source of the funds sought by Plaintiff. In the federal action, Plaintiff makes no reference to a specific source of funding, other than "outside sources." In the state action, Plaintiff specifically cites the failure of the University to provide funds available to it through the University of Colorado Foundation. Despite the difference in the source of funding, the factual basis supporting the claims in both actions is the same.

By way of further example, the Court notes that the facts supporting Plaintiff's allegations against the Foundation in the present action are identical to those which supported allegations against University defendants in the federal action. In the federal action, Plaintiff alleged that as a result of a conspiracy to prevent him from teaching he was forced in 1978 to teach a televised course and in 1980-81 he was forced to teach a course in Waterton, Colorado, for 5 students. In the present complaint, Plaintiff alleges these facts as an example of the conspiracy between the University and the Foundation to violate the Colorado constitutional prohibition against using public funds to support private corporations. According to Plaintiff, he was forced to teach these courses at the behest of the University of Colorado Foundation.

The federal complaint also alleged that the Defendants conspired to deny employment on the basis of race to Randall Nishiyama in 1982-83. Today, Plaintiff alleges minorities are excluded from Foundation support and cites as an example the failure to financially support Nishiyama in 1982-83. Plaintiff argues that financial support and employment are sufficiently dissimilar allegations to avoid the application of res judicata. Plaintiff's argument is without merit.

Through the federal complaint Plaintiff sought to hold University officials liable for a civil conspiracy to interfere with his research and employment contract. Plaintiff alleged that Defendant Seebass and others denied Plaintiff space and facilities from 1976 through 1985; denied Plaintiff funds to perform experimental research in 1982; and conspired to destroy Plaintiff's research in progress. In the present

complaint, plaintiff alleges that since 1981 Defendant Seebass has used Foundation funds to destroy Plaintiff's research. Plaintiff has apparently narrowed the target of his claims; however, this is insufficient to avoid the effect of res judicata.

In the federal complaint, Plaintiff alleged that the University had fraudulently obtained funding from the United States. Specifically, the University included as costs charged to the U.S. government the facilities and personnel of the University used by the Foundation. In the present complaint, Plaintiff realleges these facts to support a theory of state constitutional violations. Again, the identity of subject matter subjects Plaintiff's complaint to scrutiny under the doctrine of res judicata.

It is apparent to the Court after reading both complaints that Plaintiff is attempting to relitigate the same issues under different theories and remedies. Res judicata bars relitigation of any issue actually decided in a previous action, as well as any issue which might have been decided. *Manta v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 923 (1981). A party may not bring a subsequent action on any ground, theory or remedy which was not sought in the former action. *McDermott v. Bent County, Colorado Irrigation District*, 135 Colo. 70, 308 P.2d 603 (1957). Plaintiff's alternative grounds for liability are barred by the doctrine of res judicata.

Plaintiff's claims numbered VI, VII, VIII, XXIV, XXV, XXVI, XXVII and XXVIII primarily allege a civil conspiracy among Defendants to deny the rights and privileges of racial minorities secured by the Colorado Constitution. The Court finds these claims to be grounded on the same facts as Plaintiff's 1982 federal action. To the extent Plaintiff's claims present any issue regarding racial discrimination, due process and equal protection violations and denial of the right to petition, the Court holds they are barred by the doctrine of res judicata. Those issues were decided adversely to Plaintiff in the 1982 federal action and cannot be relitigated.

A primary issue in the federal action concerned the activities and procedures of the Privilege and Tenure Committee. Plaintiff alleged that the Committee willfully failed to codify the rights and privileges of the faculty, thereby, denying faculty members due process and equal protection. Additionally, Plaintiff alleged that the decisions of the Committee were racially discriminatory. In the present action, Plaintiff reasserts these claims. Further, Plaintiff testified during deposition that the identical facts support both his federal and state actions with regard to the Privilege and Tenure Committee. The Court holds that the claims numbered XIX, XX, XXI which pertain to the Privilege and Tenure Committee are barred.

E.

WHETHER THE COURT HAS JURISDICTION OVER PLAINTIFF'S CLAIM NUMBERED XXIII

Plaintiff's claim number XXIII alleges that the creation and operation of the University of Colorado Foundation and the University of Colorado Improvement Corporation is in violation of the guarantee clause of the U.S. Constitution. Plaintiff seeks from the Court a declaratory judgment to that effect. Issues involving the guarantee clause are political questions and beyond the scope of the Court's jurisdiction. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 119 (1912). Plaintiff's claim number XXIII is dismissed for failure to state a claim upon which relief can be granted.

F.

WHETHER PLAINTIFF'S CLAIMS NUMBERED VI, VII, VIII, XXIV, XXV AND XXVI STATE ANY GROUNDS UPON WHICH RELIEF CAN BE GRANTED

Plaintiff's claims numbered VI, VII, VIII, XXIV, XXV and XXVI allege that Defendants engaged in a civil conspiracy to create and operate the Foundation and Corporation for the purpose of denying to racial minorities certain rights and privileges secured by the Colorado

Constitution. Specifically, Plaintiff alleges in claims number VI and XXIV that the relationship of the University with these private entities violates the vestment of political power in the people secured by Art. II, §1; the right of the people to alter or abolish the form of government secured by Art. II, §2; the right to peaceably assemble and petition for redress of grievances secured by Art. II, §24, and the right of due process of law secured by Art. II, §25. In essence, Plaintiff is alleging that these private entities are extensions of the arm of government and as such he has the political power to control, alter or abolish them and the right to petition them for redress of grievances. Plaintiff has presented no evidence that the relationship between the University and these organizations is constitutionally repugnant; nor, has Plaintiff shown that either entity has deprived him of his rights to assemble or petition the government, or deprived him of life, liberty or property without due process of law.

In claims numbered VII and XXV, Plaintiff alleges that the relationship violates the constitutional authority of the University of Colorado Board of Regents to control the financial resources of the University secured by Art. VII, §5(2). Claims numbered VIII and XXVI allege the relationship violates Art. XI, §§1 and 2 which prohibit aiding private corporations. Essentially, Plaintiff is alleging that the Board of Regents has capitulated to these entities the power to determine the use of University of Colorado funds. Plaintiff has presented no evidence to support such an allegation beyond the assertion that the University is the recipient of funds donated to the entities; nor, is there any evidence that the property transferred to these entities by the University is a pledge of credit, a donation, or a grant in aid of a private corporation. In fact, the articles and bylaws of the organizations specifically state that the property is held for the benefit of the University. Additionally, C.R.S. §23-5-112(3) authorizes these organizations to solicit donations on behalf of the University.

The Court concludes that although Plaintiff's demands for relief are cloaked in legal terms what he is ultimately

demanding is that the Court resolve a political dispute between Plaintiff and Defendants. The Court has not been granted any authority to serve at the whim of Plaintiff as a political arbitrator and the Court declines to assume such a role without authority to do so. Any complaint the Plaintiff may have with regard to the conduct of the University should be dealt with on the floor of Congress or General Assembly and not within the halls of justice. Plaintiff in his pleadings admits he is familiar with the legislative process. No doubt he will in the future make use of it once again.

F.

WHETHER PLAINTIFF'S CLAIMS NUMBERED XX AND XXVII STATE A CLAIM UNDER 42 U.S.C. §§1983, 1985 AND 1986

The deprivation of a federal right, privilege or immunity is an essential element to any claim under 42 U.S.C. §1983. *Wise v. Bravo*, 666 F.2d 1328 (10th Cir. 1981). Plaintiff's claims numbered XX and XXVII are premised upon the alleged willful denial of Plaintiff's requests for access to certain documents pursuant to the Colorado Open Records Act. These claims do not state a deprivation of a federal right. Plaintiff's allegations are insufficient to support a claim under 42 U.S.C. §1983.

Additionally, 42 U.S.C. §1983 is not an alternative remedy. It may not be used in lieu of available state law remedies. *Brown v. City of Colorado Springs*, 749 P.2d 475, 477 (Colo. App. 1987). The Colorado Open Records Act specifically provides a remedy to any party denied access to a public record. §24-72-204(5), C.R.S. In fact, Plaintiff in this very action has made use of that remedy.

Plaintiff also alleges in his claim numbered XXVII a 42 U.S.C. §1985 claim and a 42 U.S.C. §1986 claim. As with a §1983 claim, a deprivation of a right or privilege created by the federal Constitution or other provision of federal law must be alleged in a §1985 claim. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971). Plaintiff's claim is

premised upon a state statutory violation and not a federal right.

42 U.S.C. §1986 imposes an affirmative duty upon those persons with knowledge of a planned violation of §1985 to prevent the violation. Implicit in the required elements for a §1986 claim is the necessity of incorporating a cognizable §1985 claim in the allegation. Plaintiff's complaint does not meet this test. Having failed to submit sufficient evidence to support a claim under 42 U.S.C. §§1983, 1985, or 1986, Plaintiff's claims numbered XX and XXVII are dismissed.

For the aforementioned reasons, Defendants's Motion for Summary Judgment is granted.

By the Court
MORRIS W. SANDSTEAD, JR.

DISTRICT COURT, COUNTY OF BOULDER, COLORADO

No. 85 CV 2080, Division 2

RULING AND ORDER

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Defendants.

On May 2, 1989, the following actions were taken on the above-captioned case and the Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES: None.

This matter is before the Court on:

1. Defendants University of Colorado Foundation, Charles G. McCord and Jerry L. Johnson's Motion for Clarification Pursuant to Rule 56(d), C.R.C.P., And Request for Dismissal.

2. Defendants University of Colorado Board of Regents, Charles M. Abernathy, Jr., Richard A. Bernick, Peter C. Dietze, Lynn J. Ellins, Hugh C. Fowler, Sandy F. Kraemer, Norwood L. Robb, Roy H. Shore, David K. Sunderland, Harry H. Arnold, E. Gordon Gee, Harrison Shull, Milton E. Lipetz, A. Richard Seebass, Ted D. Ayers, W.A.E. Skurnik, John Kish, Lloyd Fosdick, John Towle and Ben Rich Motion for Attorney Fees Pursuant to §13-17-102.

Having considered the pleadings, the Court enters the following rule and order.

As a clarification of its earlier rulings in this action, the Court holds:

1. All claims against all Defendants brought by Plaintiff pursuant to C.R.S. §24-72-201 are dismissed: including, Plaintiff's claims numbered I, II, III, IV, V, and XXII. Defendants University of Colorado Foundation, (Foundation), Charles G. McCord (McCord) and Jerry L. Johnson (Johnson) are not public institutions or public officials; therefore, Defendants are not subject to the Open Records Act.

2. Plaintiff's claims numbered VI, VII, VIII, XXIV, XXV, XXVI, XXVII, and XXVIII as against Defendants Foundation, McCord and Johnson are barred by the doctrine of res judicata.

> The doctrine of res judicata does not require that all parties to the suit be parties to the subsequent suit, and vice versa, but only that the party against whom the doctrine is asserted shall have been a party or in privity

with a party to the prior adjudication on the same claim.

Manta v. Martin, 624 P.2d 875 (Colo. 1980).

3. Plaintiff's claims numbered VI, VII, VIII, XXIV, XXV, and XXVI as against Defendants Foundation, McCord, and Johnson are dismissed. These claims are political questions and not subject to the Court's authority or jurisdiction.

4. Plaintiff's claim number XXII as against Defendant Johnson is dismissed. Defendant Johnson is not subject to the Open Records Act; therefore, Defendant's refusal to provide Plaintiff with access to certain records does not violate any rights of the Plaintiff under the Act.

5. Plaintiff's claim number XIII for interference with contract as against Defendants Foundation and McCord is dismissed. Plaintiff has presented no evidence that Defendants had any knowledge of the police stop of Plaintiff by Officer Kish. Further, Plaintiff has failed to provide any evidence that Defendants were involved with the University of Colorado Privilege and Tenure Committee. Additionally, Plaintiff's allegations regarding a conspiracy to deny funding is barred as against Defendants by the doctrine of res judicata. See *Manka, supra*.

Regarding the issue of the applicability of the injunction issued by the Honorable Roxanne Bailin, the Court enters the following ruling and order.

Having reviewed the transcript of the hearing before Judge Bailin and Judge Bailin's written orders, the Court makes the following findings:

1. Between December 16, 1988 and January 16, 1989, Plaintiff was entitled to file pro se in Division 2 only those responsive pleadings due during that 30 day period.

2. Between December 16, 1988 and January 16, 1989, Plaintiff was enjoined from filing pro se any new motions in Division 2.

3. Effective January 16, 1989, Plaintiff is enjoined from appearing pro se in any matter in the Twentieth Judicial District, except for post-judgment collection proceedings and appeals.

The injunction issued by Judge Bailin is applicable to this action. Pursuant to the terms of the injunction, the Court has not considered, nor will it consider in the future, any new motions filed pro se by Plaintiff after December 16, 1988, or any pleadings filed pro se by Plaintiff after January 16, 1989, except as they might relate to post-judgment collection or an appeal.

Regarding the issue of attorney fees, the Court holds that the motion shall be set on the Court's trailing docket for hearing. Counsel for Defendants is directed to contact the Court's Division Clerk for an appropriate date and time.

Having reviewed the Court's records in this action, the Court finds that all additional pending motions are either moot or not properly before the Court.

By the Court
MORRIS W. SANDSTEAD, JR.
District Court Judge

DISTRICT COURT, BOULDER COUNTY, COLORADO

No. 88 CV 1545-5

BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO,

Plaintiff,

v.

MAHINDER S. UBEROI,
Defendant.

ORDER

This matter came on for hearing on December 16, 1988. The court made oral findings of fact and conclusions of law and issued an injunction prohibiting Mahinder S. Uberoi from filing paperwork of any nature in any current or future pending case in the Twentieth Judicial District or filing any new case in the Twentieth Judicial District except matters relating to appeal or post-judgment proceedings unless he has an attorney who enter his or her appearance in any such case.

The stay is effective January 16, 1989. Mr. Uberoi was granted a thirty-day stay on filing any paperwork due in any pending case.

By the Court
ROXANNE BAILIN
Dated: December 27, 1988

DISTRICT COURT, COUNTY OF BOULDER, COLORADO

No. 88 CV 1545-5

BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO,
Plaintiff,
v.

MAHINDER S. UBEROI,
Defendant.

RE: AMENDED INJUNCTION

It having come to the Court's attention by its rereading the written injunction dated December 27, 1988, that some ambiguity may be present in said order, the Court now amends it to make clear that Mahinder Uberoi is enjoined from

representing himself in any manner in the Twentieth Judicial District beginning January 16, 1989, except in post-judgment collection proceedings or appeals.

By the Court
ROXANNE BAILIN
DISTRICT COURT JUDGE

Dated: January 23, 1989.

DISTRICT COURT, COUNTY OF BOULDER, COLORADO

Civil Action No. 85 CV 2080, Division 2

RULING AND ORDER

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Defendants.

On June 28, 1989, the following action was taken in the above-captioned case. The Clerk is directed to enter these proceedings in the register of actions.

Defendants, University of Colorado Foundation, Inc., Charles G. McCord, and Jerry L. Johnson have filed a Motion for Attorneys' fees pursuant to C.R.S. §13-17-102. Defendants' motion brings to the Court's attention that the Court's Ruling and Order of May 2, 1989 was not sufficiently specific regarding this issue. As a clarification of that decision, the Court hereby orders that a hearing be set on the matter for one and one-half hours during the week of September 4, 1989 or the week of September 11, 1989. The Court shall at that time entertain the claims of all Defendants for attorneys' fees. Counsel shall immediately contact the Court's Division Clerk for a setting.

The imposition of attorneys' fees as a sanction for Plaintiff's allegedly groundless and frivolous action has been at issue in this case from the beginning. C.R.S. §13-17-101, et seq. was raised as an affirmative defense by all Defendants in their answers to the complaint.

> Where, as here, a party places in issue a claim for attorney fees pursuant to §13-17-101, et seq., C.R.S. (1983 cum. supp.), that party has a right to, and the trial court has a duty to conduct, a hearing upon that claim. Section 13-17-101(3), C.R.S. (1983 Cum. Supp.) requires that the trial court then enter findings of fact and conclusions of law as to whether the claim or defense is 'frivolous' or 'groundless.' See *International Technical Instruments, Inc., v. Engineering Measurements Co.*, 678 P.2d 558 (Colo. App. 1983); *Moore v. DeBruine*, 631 P.2d 1194 (Colo. App. 1981). And, if a claim or defense is deemed to be frivolous or groundless, the trial court must make findings of fact sufficient to justify the amount of attorney fees awarded, if any. Section 13-17-102, C.R.S. (1983 Cum. Supp.).

Zarlengo v. Farrer, 683 P.2d 1208 (Colo. App. 1984). All of the defendants in this action are entitled to a hearing on the issue of attorneys' fees and all of the defendants shall be granted that hearing.

Plaintiff has been enjoined from appearing pro se in any proceedings in the Twentieth Judicial District, except for those related to post-judgment collections and appeals. The Court finds that the September hearing in this action is neither a post-judgment collection nor an appeal proceedings; thus, it is incumbent upon Plaintiff to obtain counsel if he desires to be heard at that hearing.

As a final matter, the Court notes for the record that the Court's Ruling and Order of May 2, 1989 specifically held,

Pursuant to the terms of the injunction, the Court has not considered, nor will it consider in the future, any new motions filed pro se by Plaintiff after December 16, 1988 or any pleadings filed pro se by Plaintiff after January 16, 1989, except as they may relate to post-judgment collection or an appeal.

On June 19, 1989, Plaintiff filed pro se a response to the motion of Defendants University of Colorado Foundation, Inc., Charles G. McCord and Jerry L. Johnson for attorneys' fees.

By the Court
MORRIS W. SANDSTEAD, JR.

Dated: July 28, 1989

DISTRICT COURT, BOULDER COUNTY, COLORADO

No. 85 CV 2080-2

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Defendants.

MOTION TO PERMIT UBEROI TO FULLY REPRESENT HIMSELF IN PROCEEDINGS TO TAX ATTORNEY FEES AND COSTS AGAINST HIM.

1. The Court has entered final judgment on the merits which is appealable regardless of any unresolved issue of attorney fees. *Baldwin v. Bright Mortgage Co.*, 757 P.2d 1072 (Colo. 1988). The judgment has been appealed to Colorado Supreme Court, Case No. 89 SA 228. The proceedings to tax attorney fees and costs against Uberoi are separate proceedings in which he is appearing in a defensive position.

Notwithstanding any orders of Judge Roxanne Bailin and/or Morris W. Sandstead, Jr., the Court lacks jurisdiction to prevent Uberoi from appearing *pro se* in a defensive position relating to claims against him for costs and attorneys' fees since it would violate U.S. Const. Amend. V, No person shall be...deprived of life, liberty and property, without due process, Amend. XIV. No state shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of law; it would also violate Colo. Const. Art. II. No person shall be deprived of life, liberty or property without due process of law.

2. In *Board of County Commissioners of the County of Boulder v. Barday*, 594 P.2d 1057, (Colo. 1979), the Supreme Court enjoined a person from appearing as a pro se plaintiff in suits relating to his marital difficulties. The Court specifically held that:

> [he] is still free to appear pro se in his own *defense*. Thus, this injunction works no infringement on respondent's constitutional rights. [Emphasis in the original, at 1059.]

3. In *Shotkin et al., v. Kaplan et al.*, 180 P.2d 1021 (Colo. 1947), the Supreme Court enjoined Shotkin from appearing as a pro se plaintiff. The court specifically held that:

> There is not involved here the right of a party to represent himself when made defendant or defendant in error. At 1022.

4. The Court should consider this motion as an emergency application and immediately enter a ruling so that, if necessary, Plaintiff may seek relief from Colorado Supreme Court.

5. A copy of this motion is being served on Clerk of Division 2 so that it is brought to Judge Morris W. Sandstead Jr.'s attention as an emergency application. Exhibit A.

WHEREFORE, Plaintiff prays that the Court grant permission to Uberoi to fully represent himself in proceedings to tax costs and attorney fees against him and that the court provide such further and additional relief it deems just and proper.

Respectfully submitted,

MAHINDER S. UBEROI, *pro se*

Dated: August 15, 1989.

Motion Denied August 16, 1989

(signed) MORRIS SANDSTEAD, JUDGE

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BOULDER COUNTY, COLORADO

DISTRICT COURT, BOULDER COUNTY, COLORADO

Case No. 85 CV 2030-2

MAHINDER S. UBEROI,

Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, et al.,

Defendants

MOTION TO PERMIT UBEROI TO FULLY REPRESENT HIMSELF IN PROCEEDINGS TO TAX ATTORNEY FEES AND COSTS AGAINST HIM.

1. The Court has entered final judgment on the merits which is appealable regardless of any unresolved issue of attorney fees. Baldwin v. Bright Mortgage Co., 757 P.2d 1072 (Colo. 1988). The judgment has been appealed to Colorado Supreme Court, Case No. 89 SA 328. The proceedings to tax attorney fees and costs against Uberoi are separate proceedings in which he is appearing in a defensive position. Notwithstanding any orders of Judge Roxanne Bailin and/or Morris W. Sandstead, Jr. the Court lacks jurisdiction to prevent Uberoi from appearing pro se in a defensive position relating to claims against him for costs and attorneys' fees since it would violate U.S. Const. Amend. V, No person shall be . . . deprived of life, liberty and property, without due process. Amend. XIV. No state shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of law; it would also violate Colo. Const. Art. II. No person shall be deprived of life, liberty or property without due process of law.

8/7/89 fc
cc: J. Kelley
M. Wilkins
M. Painter (Blay)
7 Mail

2. In Board of County Commissioners of the County of Boulder v. Barday, 894 P.2d 1057, (Colo. 1979), the Supreme Court enjoined a person from appearing as a pro se plaintiff in suits relating to his marital difficulties. The Court specifically held that:

> [he] is still free to appear pro se in his own defense. Thus, this injunction works no infringement on respondent's constitutional rights. [Emphasis in the original, at 1059].

3. In Shotkin et al., v. Kaplan et al., 180 P.2d 1021 (Colo. 194), the Supreme Court enjoined Shotkin from appearing as a pro se plaintiff. The court specifically held that:

> There is not involved here the right of a party to represent himself when made defendant or defendant in error. At 1022.

Motion denied. 8-16-89 Morris Sandstead

4. The Court should consider this motion as an emergency application and immediately enter a ruling so that, if necessary, Plaintiff may seek relief from Colorado Supreme Court.

5. A copy of this motion is being served on Clerk of Division 2 so that it is brought to Judge Morris W. Sandstead Jr.'s attention as an emergency application. Exhibit A.

WHEREFORE, Plaintiff prays that the Court grant permission to Uberoi to fully represent himself in proceedings to tax costs and attorney fees against him and that the court provide such further and additional relief it deems just and proper.

Dated: August 15, 1989

Respectfully submitted,

BY Mahinder S. Uberoi
MAHINDER S. UBEROI, pro se
819 Sixth Street
Boulder, Colorado 80302
442-2879

DISTRICT COURT, BOULDER COUNTY, COLORADO

Case No. 85 CV 2080-2

REPORTER'S TRANSCRIPT

UBEROI S. MAHINDER,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.* Defendants.

The hearing in this matter commenced on Wednesday, September 6, 1989, before the HONORABLE MORRIS W. SANDSTEAD, JR., Judge of the District Court.

FOR THE PLAINTIFF:

FOR THE DEFENDANTS: MARC PAINTER

JOHN R. MANN

PROCEEDINGS

* * *

THE COURT: [M]r Uberoi is not present. The Court's had no communication from him. Have counsel had any communication?

MR. PAINTER: No, sir.

MR. MANN: No.

* * *

THE COURT: Okay. Well, I am going to read--make some findings based on my review of the record, and then I will take your testimony and enter an order. I will ask that you

order a copy of the transcript and make it the order of the Court.

* * *

THE COURT: [I] am going to award attorney's fees in the total amount of $65,370 entered against the plaintiff, Mahinder S. Uberoi, and on behalf of Caplan and Earnest in the amount of $42,870 and on behalf of Cooper & Kelley in the amount of $22,500.

If you will draft the judgment and attach to the judgment a transcript of my order, that will be the order of the Court.

MR. MANN: Okay. Thank you, Your Honor.

THE COURT: Court's in recess.

DISTRICT COURT, BOULDER COUNTY, COLORADO

No. 85 CV 8020-2

ORDER GRANTING DEFENDANTS' MOTIONS FOR ATTORNEY FEES

MAHINDER S. UBEROI,
Plaintiff,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, *et al.*,
Defendants.

The above-referenced matter came before this Court on Defendants' Motions for Attorneys' Fees pursuant to C.R.S. §13-17-101 *et seq.* on September 6, 1989. *Plaintiff failed to appear pro se or through counsel.* [Emphasis added.]

* * *

The Court, therefore, finds, ... reasonable attorneys fees and costs in the amount of $65,370.00 are awarded against the Plaintiff, Mahinder S. Uberoi, and on behalf of Caplan and Earnest in the amount of $42,870.00 and on behalf of Cooper & Kelley, the amount of $22,500.00.

This Court also finds that the Defendants are entitled to their reasonable attorneys fees and costs in connection with their Motion for Attorneys Fees, their preparation for the hearing on the Motion for Attorneys Fees, and their costs for their expert witness, Mr. Matthews. The Court finds, based on the testimony of Mr. Matthews, that the rates charged by Defendants' attorneys are reasonable and finds that the amount of time spent in preparation for an appearance at the hearing is reasonable. Pursuant to C.R.C.P. 54(d), C.R.S. §13-17-102 and 103, Defendants are awarded their costs and reasonable attorneys fees for this motion and hearing, including the fees of their expert witness, Mr. Matthews. This Court further finds, pursuant to C.R.S. §13-33-102(4), that Mr. Matthews' rate of $125.00 per hour is reasonable, and this Court thus approves his fees and costs pursuant to C.R.S. §§13-16-122(1) and 13-33-102(4).

Defendants are, therefore, directed to submit a bill of costs and fees for this Motion and hearing pursuant to C.R.C.P. 121 §1-22 within fifteen days of the date of entry of this Order.

By the Court:
MORRIS W. SANDSTEAD, JR.

Dated: October 12, 1989.

COLORADO COURT OF APPEALS

No. 90 CA 0017

MAHINDER S. UBEROI,

Plaintiff-Appellant

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, CHARLES M. ABERNATHY, JR., RICHARD J. BERNICK, PETER C. DIETZE, LYNN J. ELLINS, HUGH C. FOWLER, SANDY F. KRAMER, NORWOOD L. ROBB, MILTON E. LIPETZ, ALBERT R. SEEBASS, TED D. AYRES, W.A.E. SKURNICK, UNIVERSITY OF COLORADO FOUNDATION INC., CHARLES G. McCORD, JOHN KISH, LLOYD FOSDICK, JOHN TOWLE, JERRY L. JOHNSON and BEN RICH,

Defendants-Appellees.

Appeal from the district Court of Boulder County

No. 85 CV 2080

Honorable Morris W. Sandstead, Judge

DIVISION V JUDGMENT AFFIRMED
Opinion by JUDGE PLANK
Hume and Ney, J.J., concur

Dated: April 25, 1991

Plaintiff, Mahinder S. Uberoi, appeals the judgment of the trial court in favor of Defendants as well as its award of attorney fees. We affirm.

Plaintiff is a professor of engineering at the University of Colorado (University). He filed pleadings in the trial court asserting 28 claims for relief against the University as well as several people and a non-profit organization affiliated with the University. His claims arise out of two distinct factual scenarios. The first concerns denials of requests by Plaintiff to inspect documents pursuant to the Open Records Act, §24-72-201, et seq. C.R.S. (1988 Repl. Vol. 10B). The second is a traffic stop by an officer of the University Police Department.

Plaintiff's allegations include claims that various Defendants violated the Open Records Act; conspired to violate several of Plaintiff's constitutional rights' tortuously interfered with Plaintiff's employment contract; violated Plaintiff's civil rights by denying him access to public records; conspired to avoid compliance with the Open Records Act; and conspired to deny Plaintiff rights under the Open Records Act in violation of the Guarantee Clause of the United States Constitution, U.S. Const. Art. 4 §4. Plaintiff also claimed that Defendant John Kish, an officer of the University Police Department, committed several torts and violated 42 U.S.C. §1983; and that the Board of Regents (Regents) negligently hired and supervised several of the Defendants.

Our discussion requires an explanation of the procedural history of this case. All references to Plaintiff's claims in this opinion correspond to the numbering of Plaintiff's complaint and amended complaint.

Claims numbered I through V concern the initial Open Records Act denials. Pursuant to statute, the trial court conducted show cause hearings on the issues involved with the requests early in the litigation. As a result, it issued an order regarding those claims in July, 1986, certifying it pursuant to C.R.C.P. 54(b) at that time.

In 1988, the trial court issued an additional order concerning additional Open Records Act requests of the Plaintiff. Later, in 1989, the University defendants moved for summary judgment on the remaining claims against them, which the court granted. Shortly thereafter, the court dismissed the remaining claims against the other Defendants. Finally, after a hearing on the issue, the trial court awarded Defendants attorney fees pursuant to §13-17-101, et seq., C.R.S. (1987 Repl. Vol. 6A).

I.

Plaintiff's first contention on appeal is that the trial court erred in concluding that it did not have jurisdiction to

consider whether Defendants had violated the Guarantee Clause. We disagree.

The trial court here held that the issue of whether a violation of the Guarantee Clause of the United States Constitution, U.S.Const. Art. 4 §4, has occurred is a political question, not a judicial question. We agree with this holding. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 325 S.Ct. 224, 56 L.Ed. 377 (1912).

II.

Plaintiff next contends that the trial court erred in granting summary judgment to Defendants based on Plaintiff's failure to provide notice pursuant to the Governmental Immunity Act, §24-10-109(1), C.R.S. (1988 Repl. Vol. 10A). We disagree.

The trial court entered summary judgment on this basis as to the public Defendants on Plaintiff's claims numbered XXII, XXIV, XXV, and XXVI. These claims allege conspiracy to avoid the Open Records Act and conspiracy to violate the Constitution.

The Colorado Governmental Immunity Act, §24-20-101, et seq., C.R.S. (1988 Repl. Vol. 10A) applies to actions "which lie in tort or could lie in tort regardless of whether that may be the type of action or form of relief chosen by a claimant." Section 24-10-102, C.R.S. (1988 Repl. Vol. 10A). Civil conspiracy is a tort.

Section 24-10-109(1) of the Act requires proper notice to be given to the governmental entity involved in the alleged tort within 180 days of the date of discovery of the injury. If notice is not given, the jurisdiction of a court over that claim is barred.

Summary judgment is a drastic remedy which is warranted only upon a showing that there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law. *Ellerman v. Kite*, 625 P.2d 1006 (Colo. 1981). The trial court must resolve all doubts as to the existence of an issue of fact against the moving party. *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981). Once the moving party makes a showing that genuine issues of material fact are lacking, the opposing party must demonstrate by specific facts that a controversy exists. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

Plaintiff submitted no evidence to the court to controvert Plaintiff' affidavits stating that they were not served with notice pursuant to the statute. Consequently, the court properly entered summary judgment on these claims.

III.

Plaintiff also contends that the court erred in entering summary judgment on the basis of Plaintiff's failure to plead compliance with conditions precedent as required by C.R.C.P. 9(c). We again disagree.

Conditions precedent are to be averred generally by Plaintiff in his pleadings. C.R.C.P. 9(c). Failure to do so subjects a claim to dismissal. *Deason v. Lewis*, 706 P.2d 1283 (Colo. App. 1985).

Section 24-10-109(1) provides, in pertinent part:

> "Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice...within one hundred eighty days after the date of discovery of the injury... . Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action." (emphasis added)

The notice requirement of the Governmental Immunity Act is a condition precedent subject to the general averment requirement in C.R.C.P. 9(c). *Deason v. Lewis, supra; Jones v. North east Durango Water District*, 633 P.2d 92 (Colo. App. 1980).

Plaintiff's claims numbered VI through XI, XIII through XV, XXII, and XXIV through XXVI were dismissed by the trial court on this basis. These claims consisted of several allegations of conspiracy, torts committed by officer Kish, tortuous interference with contract, and negligent hiring and supervision by the Regents.

Nowhere in Plaintiff's pleadings did he generally state that he had complied with conditions precedent or did he state that he had complied with the notice provisions of §24-10-109(1). Moreover, Plaintiff did not request to amend his complaint to aver compliance with conditions precedent. Consequently, the trial court properly dismissed these claims. *See Deason v. Lewis, supra.*

IV.

Plaintiff next contends that the trial court erred in granting summary judgment on the basis of *res judicata*. We disagree.

Res judicata or "claim preclusion" provides that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973). Application of *res judicata* requires identity of claims, identity of subject matter, identity of parties or privies, and identity of capacity. *Miller v. Lunnon*, 703 P.2d 640 (Colo. App. 1985).

Here, the trial court granted summary judgment on the basis of a judgment of the Denver federal district court in a case entitled, *Uberoi v. University of Colorado* (Case No. 82 LW 806).

Plaintiff in that action asserted claims against the University, the Regents, individual faculty members, and members of the administration. The claims consisted of allegations of employment discrimination; conspiracy to deny due process; conspiracy to interfere with Plaintiff's minority program, with Plaintiff's research, and with Plaintiff's employment contract; wrongful denial of access to public records; violations of 42 U.S.C. §§1981, 1983, 1985, and 1986; and violations of Plaintiff's First and Fourteenth amendment rights.

The federal court dismissed the case with prejudice pursuant to Fed. R. Civ. P. 37 and 41 for Plaintiff's failure to comply with discovery and pretrial orders.

The trial court in this action ruled that the federal court's dismissal was an adjudication on the merits sufficient to trigger the application of *res judicata*. We agree. Fed. R. Civ. P. 41(b); Restatement (Second) of Judgments §19 (1982). *See also Shaoul v. Goodyear Tire & Rubber, Inc.*, ___ P.2d ___ (Colo. App. No. 89 CA 1814, December 20, 1990).

We next need to consider whether the two actions have identity of claims, of subject matter, of parties or privies, and of capacity.

Identity of claims and subject matter arises when the claims in both actions arise from the same transaction or series of transactions. Restatement (Second) of Judgments §24(1) (1982).

> "What factual grouping constitutes a transaction and what groupings constitute a series, are to be determined pragmatically giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."
> Restatement (Second) of Judgments §24(2) (1982).

Thus, a central question is to what degree do the facts and proof of the second action tend to overlap that of the first action. Restatement (Second) of Judgments §24 comment b (1982).

Here, the trial court dismissed claims numbered V through VIII, XX, and XX, and XXIV through XXVII on the basis of *res judicata*. These claims accuse Defendants of violating Plaintiff's constitutional rights and discriminating against racial minorities in the creation of private entities to handle the funding of the University. Some of them concern Plaintiff's denial of access to records of the Privilege and Tenure Committee. The claims are motivated by Plaintiff's sense of discrimination by the University and its affiliates. They also are based on Defendants' activities which allegedly violate Plaintiff's constitutional rights. Many of the claims in the federal action concern Defendants' denial of access to documents of the Privilege and Tenure Committee.

Although the federal pleadings are much more lengthy and detailed than those in the state action, many of the facts overlap. Proof of Plaintiff's claims in the state action clearly overlaps proof of the claims in the federal action. A review of the pleadings in both actions, side by side, demonstrates obvious similarities. We agree with the conclusion of the trial court that the identity of the subject matter requirement is satisfied here.

As to the requirement of identity of parties, although different Defendants are named in the state action than those named in the federal action, in this case it does not prevent the application of *res judicata*. *See Manka v. Martin*, 200 Colo. 260, 614 P.2d 857 (1980). As to identity of capacity, the individual defendants in both cases are named both as individuals and as representatives of the University. We conclude that summary judgment was properly granted based on *res judicata*. *See Shaoul v. Goodyear Tire & Rubber, Inc., supra.*

V.

The Plaintiff next argues that the trial court erred in granting summary judgment on his claims against officer Kish. We disagree.

Plaintiff asserted four claims against officer Kish relating to the traffic stop, three torts and a 42 U.S.C. §1983 claim. In section III, above, we concluded that the trial court property dismissed the torts based on Plaintiff's failure to plead compliance with the Governmental Immunity Act. In claim XII, Plaintiff alleges that the officer deprived him of rights, liberties, and privileges secured to him by the United States Constitution thereby violating 42 U.S.C. §1983 (1979).

The trial court held that because no genuine issue of material fact existed as to the claim and because Plaintiff had failed to present evidence to suggest that the officer knew his actions violated Plaintiff's constitutional rights, summary judgment was proper. We agree with the ruling.

To state a claim for relief under §1983, Plaintiff must demonstrate that he was deprived of a right secured by the constitution or laws of the United States under color of law. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L. Ed.2d 405 1976).

The doctrine of qualified immunity provides that government officials acting within the scope of their authority are shielded from civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.2d.2d 396 (1982); *Abouzari v. Foster*, 795 P.2d 1386 (Colo. App. 1990). And, a government official is entitled to summary judgment based on qualified immunity if the undisputed facts viewed in the light most favorable to the non-moving party, show that Defendant's conduct did not violate clearly established constitutional rights of which a reasonable person would have known. *Abouzari v. Foster, supra*.

Here, Plaintiff filed an affidavit stating that officer Kish stopped him and stated that his car had crossed an intersection while in a lane designated for turning only. Plaintiff responded that there was no traffic sign to that effect, with which the officer disagreed. The officer then issued Plaintiff a warning. Thereafter, the officer detained Plaintiff for an additional twenty minutes, asking him questions about his nationality and his occupation.

Accepting these facts as true, the trial court found them insufficient to state a claim under 42 U.S.C. §1983. Not only did Plaintiff fail to show a violation of clearly established constitutional rights, but he also failed to present evidence that a reasonable person would have known that those actions would violate Plaintiff's constitutional rights. Under these circumstances, the entry of summary judgment was proper. *See Abouzari v. Foster, supra.*

VI.

Plaintiff's next contention on appeal concerns rulings that the trial court made in 1986 and certified as final at that time pursuant to C.R.C.P. 54(b).

Plaintiff asserts that the trial court erred in rulings concerning claims numbered I, II, III, IV, and V. Because the trial court, after a series of show cause hearings on these claims, certified its orders as final pursuant to C.R.C.P. 54(b), and because Plaintiff failed to file a timely appeal to the proper court pursuant to C.A.R. 4, we do not now have jurisdiction to review these contentions of error. *Bosworth Data Services, Inc. v. Gloss*, 41 Colo. App. 530, 587 P.2d 1201 (1978).

VII.

Plaintiff claims that the trial court erred in enforcing the injunction issued in a case in a different courtroom in the Twentieth Judicial District which precludes Plaintiff from appearing *pro se* in that judicial district. We disagree. Our

holding in *Board of Regents of the University of Colorado v. Uberoi*, (Colo. App. No. 89 CA 0124, October 18, 1990) (not selected for publication) disposes of this issue.

VIII.

The last issue raised by Plaintiff on appeal which we consider is whether the trial court erred in awarding Defendants attorney fees. We find that the award is supported by the record.

The trial court's award of attorney fees based on the bringing and maintaining of a frivolous and groundless claim is discretionary and will be upheld on appeal unless it is unsupported by the record. *Schoonover v. Hedlund Abstract Co.*, 727 P.2d 408 (Colo. App. 1986). However, the court must make specific findings as to its award, considering the factors outlined in §13-17-103(1), C.R.S. (1987 Repl. Vol. 6A).

Here, the trial court made detailed findings, issuing a thirteen-page order outlining the frivolousness and groundlessness of Plaintiff's complaint, claim by claim. The court clearly considered the factors listed in §13-17-103 as well as those of the Code of Professional Responsibility.

Our review of the record finds ample support for the trial court's findings. Consequently, we do not disturb them.

Plaintiff argues nonetheless that the order must be vacated since he did not appear at the attorney fee hearing.

Due process requires that Plaintiff have notice and the opportunity to be heard on this issue. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 705 S.Ct. 652, 94 L.Ed. 865 (1950). It is undisputed that Plaintiff had notice of the hearing; yet, he failed to appear. And, although he requested a continuance, the trial court denied his request prior to the hearing. Under such circumstances, due process was satisfied. Since Plaintiff had notice and the opportunity to

be heard, he cannot now complain of what transpired. *See Johnson v. George*, 119 Colo. 594, 206 P.2d 345 (1949).

Plaintiff raises numerous other claims on appeal. We have considered each and find that they either are without merit or were not properly preserved for appeal.

Accordingly, judgment is affirmed.

JUDGE HUME and JUDGE NEY concur.

COLORADO COURT OF APPEALS

No. 90 CA 0017

MAHINDER S. UBEROI,
Plaintiff-Appellant,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, CHARLES M. ABERNATHY, JR., RICHARD J. BERNICK, PETER C. DIETZE, LYNN J. ELLINS, HUGH C. FOWLER, SANDY F. KRAMER, NORWOOD L. ROBB, MILTON E. LIPETZ, ALBERT R. SEEBASS, TED D. AYRES, W.A.E. SKURNICK, UNIVERSITY OF COLORADO FOUNDATION INC., CHARLES G. McCORD, JOHN KISH, LLOYD FOSDICK, JOHN TOWLE, JERRY L. JOHNSON and BEN RICH,
Defendants-Appellees.

Appeal from the District Court of Boulder County

No. 85 CV 2080

Honorable Morris W. Sandstead, Judge

DIVISION Opinion by JUDGE PLANK Hume and Ney, concur

Plaintiff., JUDGMENT AFFIRMED AND CAUSE REMANDED WITH DIRECTIONS

Opinion Modified, and
As Modified, Petitions
for Rehearing DENIED

April 25, 1991

OPINION is modified as follows:

Beginning on page 12, 21 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by capitalization in bold) are made:

~~Accordingly, judgment is affirmed.~~

DEFENDANTS, UNIVERSITY OF COLORADO BOARD OF REGENTS, REQUEST AN AWARD OF ATTORNEY FEES AND DOUBLE THE COSTS FOR THIS APPEAL. WE AGREE THAT THE PLAINTIFF'S APPEAL IS FRIVOLOUS. *SEE MISSION DENVER CO. V. PIERSON*, 674 P.2d 363 (Colo. 1984). THEREFORE, THESE DEFENDANTS ARE ENTITLED TO RECEIVE THEIR REASONABLE ATTORNEY FEES FOR DEFENSE OF PLAINTIFF'S APPEAL. WE DECLINE TO AWARD DOUBLE COSTS.

THE JUDGMENT IS AFFIRMED. THE CAUSE IS REMANDED TO THE TRIAL COURT FOR DETERMINATION AND AWARD OF THE UNIVERSITY OF COLORADO BOARD OF REGENTS REASONABLE ATTORNEY FEES FOR DEFENSE OF THIS APPEAL.

COURT OF APPEALS
STATE OF COLORADO
Court of Appeals Case No. 90 CA 0017
Trial Court No. 85 CV 2080

ORDER

MAHINDER S. UBEROI V. UNIVERSITY OF COLO. ET AL

Upon consideration of the Petitions for Rehearing filed by the Appellant and Appellee herein, the Opinion is Modified and as Modified, Petitions for Rehearing is DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including June 24, 1991, provided that if a Petition for Writ of Certiorari is timely with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

PLANK, J.J.; HUME, J.; NEY, J.

Dated: May 23, 1991.

SUPREME COURT, STATE OF COLORADO

No. 91 SC 374

Certiorari to the Colorado Court of Appeals 90 CA 0017

Boulder County District Court 85 CV 2080

ORDER OF COURT

MAHINDER S. UBEROI,
Petitioner,

v.

UNIVERSITY OF COLORADO BOARD OF REGENTS, CHARLES M. ABERNATHY, JR., RICHARD J. BERNICK, PETER C. DIETZE, LYNN J. ELLINS, HUGH C. FOWLER, SANDY F. KRAMER, NORWOOD L. ROBB, MILTON E. LIPETZ, ALBERT R. SEEBASS, TED D. AYRES, W.A.E. SKURNICK, UNIVERSITY OF COLORADO FOUNDATION INC., CHARLES G. McCORD, JOHN KISH, LLOYD FOSDICK, JOHN TOWLE, JERRY L. JOHNSON and BEN RICH,
Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 28, 1991.